Applicant Details

First Name	**Siobhan**
Last Name	**Allen**
Citizenship Status	**U. S. Citizen**
Email Address	**sja2161@columbia.edu**
Address	**Address** Street **352 W 56th St, Apt 1A** City **New York** State/Territory **New York** Zip **10019** Country **United States**
Contact Phone Number	**7142611483**

Applicant Education

BA/BS From	**New York University**
Date of BA/BS	**May 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 18, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**LaLSA Asylum and Refugee Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Mukherjee, Elora
emukherjee@law.columbia.edu
212-854-6142
Funk, Kellen
krf2138@columbia.edu
5056093854
Glass, Maeve
maeve.glass@law.columbia.edu
_212_ 854-0073

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Siobhan Allen
352 W 56th St, Apt 1A
New York, NY 10019
714-261-1483
Sja2161@columbia.edu

May 18, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East Brooklyn, New York 11201
Chambers: Room S905 Courtroom: 6C South

Dear Judge Matsumoto:

I am a law clerk at Sullivan & Cromwell LLP and recent graduate of Columbia Law School, where I was a Ruth Bader Ginsburg Scholar and a Managing Editor of the *Columbia Human Rights Law Review*. I write to apply for a clerkship in your chambers beginning in 2025.

Enclosed please find a resume, transcript, and writing sample. My writing sample is an excerpt of my Note, which was published in the *Columbia Journal of Law and Social Problems*. *See* Siobhan Allen, Note, *The Role of the Excessive Fines Clause in Ending the Criminalization of Homelessness*, 55 COLUM. J. OF L. & SOC. PROBS. 499 (2022). I have also enclosed the entire Note in the form in which it was published. Also enclosed are letters of recommendation from Professors Kellen Funk (212-854-0675, krf2138@columbia.edu), Elora Mukherjee (212-854-4293, emukherjee@law.columbia.edu), and Maeve Glass (212-854-0073, maeve.glass@law.columbia.edu).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Siobhan Allen

SIOBHAN ALLEN
352 W 56th St, Apt 1A, New York, NY 10019 • (714) 261-1483 • sja2161@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. received May 2022
Honors: Ruth Bader Ginsburg Prize
James Kent Scholar (2019-2020; 2020-2021; 2021-2022)
Publications: *The Role of the Excessive Fines Clause in Ending the Criminalization of Homelessness* (E. Allan Farnsworth Note Competition Winner, *Columbia Journal of Law and Social Problems*)
Activities: *Columbia Human Rights Law Review*, Managing Editor
LaLSA Asylum and Refugee Law Moot Court
Teaching Fellow for Prof. Maeve Glass
Academic Coach (Civil Procedure, Contracts, Property)
OutLaws, Firm Relations Co-Chair

New York University, New York, NY
B.A. in Individualized Study with a minor in Spanish, *cum laude*, received May 2019
Honors: Dean's List (Fall 2016 – Spring 2019)
Publications: *Esferas* – Issue 10 (Spring 2020); "María"
Study Abroad: NYU Madrid (Spring 2018–Summer 2018)
NYU Buenos Aires (Spring 2017)

BAR ADMISSIONS

Passed July 2022 New York bar exam, awaiting admission

EXPERIENCE

Sullivan & Cromwell LLP, New York, NY
Law Clerk; *Summer Associate* September 2022–Present; Summer 2021
Participated in federal court litigation and complex corporate internal investigations through legal research, document review, and drafting memoranda. Performed extensive legal research on a variety of matters, encompassing civil disputes and criminal enforcement actions. Edited various litigation documents for consistency and accuracy.

Immigrants' Rights Clinic, New York, NY
Student Attorney August 2020–December 2021
Drafted briefs and affidavits on the behalf of asylum seekers and other individuals seeking immigration relief. Led interviews with clients and witnesses. Completed and submitted various immigration forms to federal government organizations on behalf of clients.

National Homelessness Law Center (Formerly The National Law Center on Homelessness and Poverty), Washington, D.C.
Legal Intern Summer 2020
Researched on the impact of COVID-19 on homelessness and delivered summaries. Wrote a memorandum on Title V of the McKinney-Vento Act. Updated information on government compliance with injunctions.

The Legal Aid Society, New York, NY
Intern Fall 2018
Conducted interviews of witnesses. Collected background information for criminal cases. Assisted trial lawyers and observed arraignments.

LANGUAGES: Spanish (advanced)
INTERESTS: Weightlifting, classically trained vocalist, puzzles, cooking

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/18/2023 11:07:11

Program: Juris Doctor

Siobhan J Allen

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Capra, Daniel	4.0	A
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
L6473-1	Labor Law	Andrias, Kate	4.0	A
L9183-1	S. Nuremberg Trials and War Crimes Law	Bush, Jonathan	2.0	A-

Total Registered Points: 11.0

Total Earned Points: 11.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9259-1	Advanced Immigrants' Rights Clinic	Mukherjee, Elora; Wilson, Amelia	3.0	CR
L6231-3	Corporations	McCrary, Justin	4.0	A-
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
L6359-1	Professional Responsibility in Criminal Law	Cross-Goldenberg, Peggy	3.0	A
L6330-1	S. Native American Law [Minor Writing Credit - Earned]	Benally, Precious Danielle; McSloy, Steven	2.0	A
L6822-1	Teaching Fellows	Mukherjee, Elora	1.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9259-1	Advanced Immigrants' Rights Clinic	Mukherjee, Elora; Wilson, Amelia	3.0	A
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A
L6655-1	Human Rights Law Review		0.0	CR
L6822-1	Teaching Fellows	Glass, Maeve	4.0	CR
L6294-1	Trusts and Estates	Rapaczynski, Andrzej	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L9258-1	Immigrants' Rights Clinic	Mukherjee, Elora; Wilson, Amelia	3.0	A
L9258-2	Immigrants' Rights Clinic - Project Work	Mukherjee, Elora; Wilson, Amelia	4.0	A
L6169-1	Legislation and Regulation	Merrill, Thomas W.	4.0	B+
L6675-1	Major Writing Credit	Funk, Kellen Richard	0.0	CR
L6683-1	Supervised Research Paper	Funk, Kellen Richard	1.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Barenberg, Mark	4.0	CR
L6108-4	Criminal Law	Harcourt, Bernard E.	3.0	CR
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	CR
L6862-1	Lalsa Moot Court	Rodriguez, Alberto; Strauss, Ilene	0.0	CR
L6121-29	Legal Practice Workshop II	Rodriguez, Alberto	1.0	CR
L6118-2	Torts	Zipursky, Benjamin	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-6	Legal Methods II: Social Justice Advocacy	Franke, Katherine M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-3	Civil Procedure	Genty, Philip M.	4.0	A-
L6105-2	Contracts	Mitts, Joshua	4.0	A-
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-9	Legal Practice Workshop I	Hajjar, Tanya; Neacsu, Dana	2.0	P
L6116-1	Property	Glass, Maeve	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 87.0

Total Earned JD Program Points: 87.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	Ginsburg Scholar	3L
2021-22	James Kent Scholar	3L
2020-21	James Kent Scholar	2L
2019-20	James Kent Scholar	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	3.0

May 19, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

We write to offer our enthusiastic support for Siobhan Allen's application to serve as a judicial law clerk in your chambers. Siobhan is bright and hardworking, a strong legal writer, and a great team player. She has been awarded the prestigious Kent Scholar designation for her academic achievement in both her first and second years at Columbia Law School. She will be an exemplary law clerk. You should hire her.

Siobhan enrolled as a student in the Immigrants' Rights Clinic in the Fall 2020 semester, and continued in the Advanced Immigrants' Rights Clinic in the Spring 2021 semester. The Immigrants' Rights Clinic offers students an opportunity to engage in an intensive learning environment in which they learn about asylum law and other forms of immigration relief and take the lead in representing an asylum seeker. Students' time commitment to the clinic includes approximately five hours of seminar time each week plus about 21-hours of case-related work each week over the course of a semester. In the Advanced Immigrants' Rights Clinic, students engage in a weekly one-hour seminar and take on more challenging and complex casework and advocacy projects.

Throughout her year in the clinic, Siobhan distinguished herself among a group of talented students. Below are descriptions of Siobhan's major contributions:

First, Siobhan's primary responsibility was to represent a labor rights activist from China who was seeking asylum. Together with two clinic student partners, Siobhan led dozens of client interviews, drafted our client's asylum affidavit, gathered evidence for the case including from China, interviewed multiple witnesses, wrote substantial portions of the brief, and helped our client prepare to testify. She also secured multiple experts to support our client's case, including a forensic psychiatry expert who produced an individualized evaluation and a country conditions expert who wrote a detailed report explaining why our client would be in danger if forced to return. Working terrifically well with her teammates, Siobhan assembled hundreds of pages of evidence in support of our client's case. Our client's case is still pending before the asylum office, and there is no question that Siobhan has provided her with the best representation possible.

Second, Siobhan helped to provide critical representation for two immigrant women who were detained at the notorious Irwin County Detention Center in rural Georgia. Both women were at high risk of complications or death from COVID-19 due to their underlying co-morbidities. Working with her student partners, Siobhan led interviews with each of these women via videoconferencing, combed through their medical records, and wrote release requests for them based on an analysis of the preliminary injunction in the case *Fraihat, et al v. U.S. Immigration and Customs Enforcement, et al*., Case No. 5:19-cv- 01546-JGB-SHK (C.D. Cal. Oct. 7, 2020), ECF No. 240. Thanks to Siobhan's efforts, both of these women were released from detention and have happily reunited with their families.

Third, Siobhan and a team of students worked together to offer legal representation to an immigrant woman living in Brooklyn who had suffered medical abuse during her time in immigration custody. Siobhan helped this client to secure authorization to work legally in the United States. With her teammates, Siobhan also assisted this client with preparing her application for Deferred Action for Childhood Arrivals (DACA) and filing a stay of removal.

Throughout her time in the clinic, Siobhan has demonstrated attention to detail, a willingness to support her peers, and a dedicated work ethic. She has strong legal research and writing skills and a bright and inquisitive legal mind. She works well on teams and is an adaptable and fast learner. Her peers in the clinic respect her work and seek out her opinion.

It is not a surprise that Siobhan is a leader on campus. She serves as the Managing Editor of the *Columbia Human Rights Law Review*. She has been selected as an Academic Coach for both Civil Procedure and Contracts, and as a Teaching Fellow for Property. Given her breadth of legal curiosity and her team spirit, she would fit in well in any chambers.

We would be delighted to discuss Siobhan's application further. Please do not hesitate to contact us at your convenience.

Very truly yours,

Elora Mukherjee
Jerome L. Greene Clinical Professor of Law
Director, Immigrants' Rights Clinic
Direct office phone: 212.854.2603
Mobile phone: 203.668.2639
emukherjee@law.columbia.edu

Amelia Wilson
Supervising Attorney

Immigrants' Rights Clinic
Direct office phone: 212.854.0171
Mobile phone: 312.316.7003
amelia.wilson@law.columbia.edu

Elora Mukherjee - emukherjee@law.columbia.edu - 212-854-6142

May 19, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:I write to recommend Siobhan Allen (Columbia ’22) for a clerkship in your chambers during the earliest available term. I supervised Ms. Allen at Columbia Law School as she wrote a student note assessing an innovated Excessive Fines Clause approach to litigating against the criminalization of homelessness. She was then a quite successful student in my large Federal Courts section and finished the year as a James Kent Scholar, our highest academic honor. Ms. Durbin is a strong researcher and writer, and I am certain she will make a terrific clerk.

I got to know Ms. Allen through her visits to my office to discuss her note. Her visits were well-timed—neither too frequent that she was over-relying on my guidance nor too scarce to keep me informed of her progress. She has a rare talent for knowing when she needs to invest the work to solve a particular puzzle herself and when she is at the point that consulting a supervisor is worthwhile.

Ms. Allen has wide-ranging curiosities and is able to grapple with some of the more difficult abstract problems that arise from the overlap of civil and criminal, substantive and procedural rules. Her note demonstrates, first, the concrete ways municipalities essentially criminalize homelessness and poverty while technically avoiding Robinson v. California’s proscription of status crimes, often making recourse to “civil” penalties and forfeitures. Ms. Allen then offers a creative analysis for understanding these regulations and how they might run afoul of constitutional law by looking to the Excessive Fines Clause. As the Supreme Court has broadly applied the Clause to civil penalties and forfeitures and has taken a recent historical interest in the ways the Reconstruction Amendments were meant to apply the Clause broadly against state and local governments, Ms. Allen shows its remarkable fitness to analyzes what at first appears to be a host of unrelated police measures taken against homeless encampments. The note has the special quality of revealing something that feels like it should be obvious but isn’t until someone has gone to the extraordinary work of clarifying the tangle of precedents. I commend it to you should you find a civil rights challenge to homelessness regulations on your docket.

As a junior professor, I understand that superlatives like “top tier student” do not count for much yet. What I can say is that I was recently in the business of hiring clerks myself—in the chambers of Judge Lee H. Rosenthal of the Southern District of Texas and Judge Stephen F. Williams of the D.C. Circuit. Both judges had formidable, exacting standards for writing that was concise, efficient, and clear, and for clerks that were responsible, thoughtful, and engaging. By those standards, I would have leapt at the chance to hire Ms. Allen, and I hope you will strongly consider her candidacy.

I am available by phone or e-mail at 505-609-3854 and krf2138@columbia.edu if you would like to discuss Ms. Allen’s application further.

Regards,

Kellen Funk

May 19, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to enthusiastically recommend Siobhan Allen as a candidate for a judicial clerkship. I had the privilege to work with Siobhan over the past two years. As a first-year law student, Siobhan enrolled in my introductory Property class and became a frequent and welcome visitor in the small group office hours that I hosted each week. Over the course of the semester, Siobhan impressed me with her excellent intellectual abilities, including her outstanding analytical and writing skills that placed her in the top 3% of a class of nearly one hundred students. As testament to these skills, Siobhan was named a James Kent Scholar during both her first and second year of law school, before being invited to join Sullivan & Cromwell as a summer associate. An aspiring advocate and legal academic who served as a brilliant Teaching Fellow for my Property course this past spring, Siobhan possesses all the qualities to be an excellent clerk.

Siobhan first reached out to me during the early weeks of her first year at the Law School, when she took the initiative to attend a small group session. A fluent Spanish and English speaker who came to law school with a host of prior professional experiences, including working in a non-profit organization in Buenos Aires and at a research university in Madrid, Siobhan introduced herself to the room with poise and professionalism. A natural collaborator who was selected later that fall to participate in the Latin American Law Student Association's Asy-lum and Refugee Law Moot Court, Siobhan enriched each of the small group sessions with her thoughtful questions and succinct summaries of the doctrine. When, for example, we made our way through the unit on adverse possession, Siobhan elevated the conversation by asking how the doctrine of adverse possession might relate to tribal lands and the doctrine of discovery. To what extent, she wondered, might the holding in *Zuni Tribe v. Platt* recognizing a prescriptive easement claim for a centuries-old religious pilgrimage be generalizable to Native American rights in general?

Owing to the ease with which Siobhan drew these insightful connections between the cases and different doctrinal areas of the course, it came as little surprise when I downloaded her anonymous exam and began to read her remarkable set of final essays for the course, each of which revealed a sophisticated grasp of the doctrine, skillful application of the rules, and mature consideration of counter-arguments and alternative approaches. For example, in one particularly strong part of the exam, Siobhan analyzed whether an agreement among siblings to prevent the sale of their family's land they held as a tenancy in common would be enforceable under the law of real covenants, or in the alternative, whether the court should follow New Jersey and adopt a reasonableness test. In analyzing this question, Siobhan attended to minute factual details and concepts that eluded her peers. For example, she was one of the few students to note that the determination of whether the element of horizontal privity was met would hinge on the extent to which, as tenants in common, the siblings shared a simultaneous interest in the estate.

Alongside this mastery of the doctrine and attention to factual detail, Siobhan's essays also revealed a striking ability to see and concisely communicate the broader picture at stake, using the same lens of mature professionalism that had characterized her comments throughout the semester. For example, in an essay analyzing which of the Supreme Court's "public use" tests the hypothetical jurisdiction of Columbia ought to adopt in interpreting its state constitution, Siobhan succinctly and accurately summarized each of the main approaches laid out in *Kelo*, before making a persuasive case as to why, in her view, Justice O'Connor's approach was preferable in interpreting the state's Fifth Amendment. Whereas other students rigorously argued in favor of an approach without considering potential alternatives, Siobhan carefully evaluated each of the approaches' benefits and shortcomings, drawing on examples from the case law as well as the broader goals of property law. Having evaluated the approaches, Siobhan then skillfully applied the test to the particular facts of the case at hand, accurately and succinctly synthesizing the arguments she anticipated the parties would make.

Based on the high caliber of Siobhan's legal abilities, I was delighted to welcome her back to Property this past spring as a Teaching Fellow. Despite the challenging circumstances of teaching over Zoom, Siobhan quickly adapted to the novel environment and created a warm, welcoming and supportive environment for the new class of 1Ls. As a Teaching Fellow, Siobhan led the students through difficult problem sets each week, while fielding doctrinal questions and serving as a mentor. As a testament to Siobhan's formidable organizational and time management skills, she accomplished this feat of mentorship and teaching while also serving as a staff editor on the *Columbia Human Rights Law Review*, advocating on behalf of clients in the Immigrant's Right Clinic, serving as an Academic Coach, and also serving as a board member for her affinity group, Outlaws. A fast learner who is adaptable and able to thrive under time pressure, Siobhan ended this past year once more at the top of her class as a James Kent Scholar, while also receiving a Managing Editor position for her journal.

It has been a true privilege and joy to work with, and learn from, Siobhan. Brilliant in mind, generous in spirit, and steadfast in her determination and work ethic, Siobhan has time and again demonstrated her ability to shine in even the most challenging and novel environments. I have no doubt that she would be an excellent clerk in your chambers. If I can be of any further assistance in your review process, please do not hesitate to reach me at (202) 386 2097.

Thank you for your time and consideration.

With best regards,

Maeve Glass - maeve.glass@law.columbia.edu - _212_ 854-0073

Maeve Glass

Maeve Glass - maeve.glass@law.columbia.edu - _212_ 854-0073

SIOBHAN ALLEN
Columbia Law School J.D. '22
714-261-1483
Sja2161@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This writing sample is an excerpt from my Note. My Note argues that the Excessive Fines Clause of the Eighth Amendment is an effective constitutional framework for protecting people experiencing homelessness from excessive criminalization. I have included a portion of Sections I and II, which explore the state of Eighth Amendment legal protections for people experiencing homelessness.

Section I of my Note explores the history of civil punishment of homelessness in the United States and the history of the Excessive Fines Clause. Section II discusses the possibility of using the Excessive Fines Clause as a constitutional protection against civil punishment for people experiencing homelessness, including what is required for a civil punishment to be a "fine" within the meaning of the Clause, the definition of "excessive" within the meaning of the clause, and how proportionality between perpetrator, action, and the amount of a fine factors into the "excessiveness" analysis. Section III discusses the benefits and drawbacks of applying the Excessive Fines Clause as a constitutional framework for people experiencing homelessness. The Note concludes by arguing that the Excessive Fines Clause should be used as a tool to stop the criminalization of homelessness.

1. Martin v. City of Boise's Application of the Robinson Doctrine to People Experiencing Homelessness

In *Martin v. City of Boise*, the Ninth Circuit, applying *Robinson*,[1] held that punishing people experiencing homelessness for sleeping outside violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[2] In *Martin*, eleven unhoused plaintiffs sued the city of Boise, arguing that the enforcement of anti-homelessness ordinances in Boise violated their Eighth Amendment rights.[3] One plaintiff, Janet Bell, received a thirty day sentence after two citations–one for sitting on a riverbank with a backpack, the other for putting down a bedroll in the woods.[4] Another plaintiff, Martin, was cited for resting near a shelter.[5] Martin was found guilty at trial and charged $150.[6] On these facts, the Ninth Circuit stated that sleeping outside was a human necessity (if there were insufficient shelter beds), and therefore it was unconstitutional to criminalize sleeping outside under *Robinson v. California*.[7] This decision is a victory for unhoused plaintiffs, but comes with complications.

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[1] *Martin's* application of the *Robinson* doctrine has proved controversial. *See, e.g.*, West Menefee Bakke, *Against the Status Crimes Doctrine*, 73 SMU L. REV. F. 232, 239 (2020) (stating that "The Ninth Circuit's decision in *Martin* was incorrect. Instead of relegating the status crimes doctrine to the limited context of disease, the Ninth Circuit *expanded* it to cover homelessness") (emphasis added)); Brief for The International Municipal Lawyers Ass'n, et al. as Amici Curiae Supporting Petitioners, City of Boise v. Martin, *cert. denied*, 140 S.Ct. 674 (2019), (No. 19-247) (arguing that the Ninth Circuit "improperly expand[ed]" the reach of the Eighth Amendment); John Hirschauer, NAT'L REV., *Why Didn't the Supreme Court Take This Homelessness Case?*, https://www.nationalreview.com/2020/01/why-didnt-the-supreme-court-take-this-homelessness-case/ (arguing that *Martin* incorrectly combines Justice White's concurrence with the dissenters from *Powell*); Devin R. McDonough, *Constitutional Law – Ninth Circuit Decision Presents Public Health Dilemma with Improper Eighth Amendment Application – Martin v. City of Boise*, 16 J. HEALTH & BIOMEDICAL L. 153, 160 (2020) ("The Ninth Circuit inappropriately concluded that the Eighth Amendment prohibits issuing criminal penalties to those homeless individuals sitting, sleeping, or lying outside on public property when those individuals are incapable of obtaining shelter"). *But see* Joy H. Kim, Note, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1181 (2020) ("Just as the Robinson Court prohibited criminalizing addiction, courts should not allow cities to criminalize individuals for sleeping outside if existing shelters in that city bar individuals with substance use disorders").

[2] Martin v. City of Boise, 920 F. 3d 584, 617 (9th Cir. 2019).

[3] HARV. L. REV., *Martin v. City of Boise*, https://harvardlawreview.org/2019/12/martin-v-city-of-boise/.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Martin v. City of Boise, 920 F. 3d 584, 617 (9th Cir. 2019).

Martin uses *Robinson's* distinction between status and action and applies it to the criminalization of homelessness.[8] This creates a distinction between "culpable" and "nonculpable" homelessness, where "culpable" homelessness constitutes actions while "nonculpable" homelessness constitutes status.[9] As a result, culpable homelessness can be punished, while nonculpable homelessness cannot be. The *Martin* court considered questions of "inevitability, unavoidability, and involuntariness," but only to the limits of availability of shelter beds.[10] *Martin* also considers these questions in the context of total number of shelter beds versus total number of unhoused persons, rather than focusing on an individual's survival needs and the accessibility of shelter beds to that particular individual.[11] The analysis of criminalization under the *Robinson* doctrine means that much of the behavior criminalized by anti-homelessness ordinances would not be considered unconstitutional, because the behavior would be considered actions rather than status.

Additionally, *Martin* is unclear as to whether its protections extend to civil punishment or exclusively cover criminal punishment.[12] Yet civil punishment can impair unhoused people, or can lead to criminal punishments, such as warrants and incarceration.[13] Civil punishment comes

[8] R. George Wright, *Homelessness, Criminal Responsibility, and the Pathologies of Policy: Triangulating on a Constitutional Right to Housing*, 93 St. John's L. Rev. 427, 437 (2019).
[9] *Id.*
[10] *Id.*
[11] *Id.* Excessive bail under the Eighth Amendment is also subject to complications surrounding individualized circumstances. *See* CONG. R. SERV., *U.S. Constitutional Limits on State Money-Bail Practices for Criminal Defendants* 2 (2019) ("Typically, judges do not assess a detainee's individual characteristics beyond the offense charged; instead, judges set a defendant's bail based on the criminal offense with which he is charged"). *But see* Kellen Funk, *The Present Crisis in American Bail*, YALE L.J. F. (Apr. 22, 2019) (describing how social movements, including "that unaffordable bail is permissible only when a court finds that release on any other conditions would not reasonably assure the individual's appearance….fuel the current crisis of bail as much as the empirical studies").
[12] *See infra* Section I.C.1.
[13] *See generally* Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020) (discussing the rift between due process rights and the criminalization of poverty).

in many forms, and can result in various consequences.[14] A civil fine could result in additional fines–including fines related to the offense, court-imposed fines, surcharges for court and non-court related costs, and collection costs on unpaid balances.[15] Civil fines can lead to suspension of driver's licenses,[16] failure to pay warrants,[17] and arrests.[18] If people experiencing homelessness do not have civil protections under *Martin*, they could easily end up incarcerated for not paying a civil fine just the same as if they had been arrested.[19]

The weaknesses in *Martin* exemplify the weaknesses in the *Robinson* doctrine. States may choose to criminalize urinating, sleeping, and eating in public,[20] and a person experiencing homelessness may have no recourse if courts decide that these necessary for life activities are conduct rather than status. This allows for a state to wait for an unhoused person to do something necessary for their survival that the state can prescribe as conduct, and then to criminalize the behavior as "conduct" rather than "status."[21] States therefore have two potential paths to continue

[14] Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS'N, Oct. 3, 2016, https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/.
[15] *Id.*
[16] Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1504 (2020).
[17] *Id.* at 1501.
[18] Monica Llorente, Criminalizing Poverty Through Fines, Fees, and Costs, AM. BAR ASS'N, Oct. 3, 2016, https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/ ("the court routinely imposed excessive fines and ordered the arrest of low-income residents for failure to appear or to make payments, sometimes despite inadequate notice and also without inquiring into their ability to pay").
[19] In theory, wealth-based barriers to litigation access (especially in criminal cases) violate equal protection. In *Bearden v. Georgia*, the Supreme Court created a four-part test for determining whether a state was violating the rights of indigent offenders. The test requires courts to inquire into (1) the nature of the individual interest concerned; (2) the extent to which that interest is impacted by the government policy; (3) whether the nexus between the policy's purpose and means is rational; and (4) whether any alternative means exist to accomplish that purpose. In practice, LFOs (legal financial obligations, such as fines and fees imposed on defendants) are increasingly popular. While scholars have argued that there should be a constitutional guarantee of an "ability to pay" inquiry for fines and fees, LFOs remain in widespread use, partially because they are often related to a government's legitimate interest in funding municipal services. Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 122 (2020).
[20] Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329, 330 (2005).
[21] *Id.* at 346.

to criminalize homelessness despite *Robinson*– first, to criminalize an "act," or second, to create a civil punishment.

II. FILLING THE GAP LEFT BY *MARTIN V. CITY OF BOISE* WITH THE EXCESSIVE FINES CLAUSE

Read expansively, *Martin* could provide robust protections for people experiencing homelessness. However, with many of the cases in which *Martin* is applied, people experiencing homelessness are not afforded any Eighth Amendment protections.[22] This Section explores the gap left by *Martin* and the *Robinson* doctrine for people experiencing homelessness. In this Section, this Note argues that the Excessive Fines Clause could be used to strike down ordinances that criminalize behavior by using the "status" versus "conduct" distinction, and would allow courts to determine the constitutionality of these ordinances based on the proportionality of the designated punishment to the civil offense.[23] The Excessive Fines Clause could also be used to bridge the gap between civil and criminal punishment, and instead focus on the impact of the punishment on the individual.[24] Through an individualized and proportional analysis, the Excessive Fines Clause offers relief for unhoused litigants.

A. *Martin v. City of Boise* and Civil Protections Against the Criminalization of Homelessness

Martin v. City of Boise provides Eighth Amendment protections for people experiencing homelessness in limited circumstances under *Robinson*, a murky distinction that makes *Martin* susceptible to being narrowed or expanded, depending on a court's reading of "status" versus "conduct."[25] Additionally, *Martin* is unclear in its application to civil punishment, despite the

[22] In other words, *Martin* is susceptible to the same weaknesses as *Robinson*. *See infra* Section I.C.2.
[23] *See infra* Section II.B.
[24] *Id.*
[25] R. George Wright, *Homelessness, Criminal Responsibility, and the Pathologies of Policy: Triangulating on a Constitutional Right to Housing*, 93 ST. JOHN'S L. REV. 427, 435-7 (2019).

fact that civil punishment may be equally disruptive to an individual's life and in certain cases may lead to criminal punishment.[26]

The Fourth Circuit has cited favorably to *Martin's* extension of the *Robinson* doctrine to unhoused persons in *Manning v. Caldwell for City of Roanoke*.[27] In *Manning*, the statutory scheme at issue "authorize[d] Virginia to obtain, in absentia, a *civil* interdiction order against persons it deem[ed] 'habitual drunkards,'" and then "permit[ed] Virginia to rely on the interdiction order to *criminally prosecute* conduct permitted for all others of legal drinking age" (emphasis added).[28] The declaration of status as a "habitual drunkard" was a civil designation that led to criminal punishment for possession or attempted possession of alcohol.[29] The Fourth Circuit construed this as "cruel and unusual" punishment under the *Robinson* doctrine, and stated that the only other circuit court to face this issue had been the Ninth Circuit in *Martin*, which came to the "same conclusion" as the Fourth Circuit.[30] The Fourth Circuit's willingness to invalidate a partially civil punishment while claiming *Martin* came to the same conclusion on the same issue opens the door for a broad reading of *Martin*, one that includes striking down civil punishment. The Fourth Circuit's interpretation of *Martin* could be demonstrative of a broad reading of the case going forward.[31]

However, the Eleventh Circuit has expressly declined to follow *Martin's* reasoning, citing public health concerns and describing the criminalization of people experiencing

[26] *Id.*
[27] Manning v. Caldwell for City of Roanoke, 930 F.3d 264, FN 17 (4th Cir. 2019).
[28] *Id.* at 268.
[29] *Id.* at 268-169.
[30] *Id.* at FN 17.
[31] An Ohio District Court has also cited favorably to *Martin*. Although the court did not address unhoused plaintiffs Eighth Amendment claims at length in *Phillips v. City of Cincinnati*, the court did say that plaintiffs would be likely to succeed on an Eighth Amendment claim if they could show that there were not available shelter beds, citing to *Martin* as the Sixth Circuit had not yet addressed this issue. Phillips v. City of Cincinnati, 2019 WL 2289277 FN 6 (S.D. Ohio May 29, 2019).

homelessness as criminalizing "actions" rather than "status."[32] In *Joel v. City of Orlando*, the Eleventh Circuit placed heavy emphasis on the city's interest in "aesthetics, sanitation, public health and safety."[33] The Eleventh Circuit's focus on the city's interest and its inclination to treat the behaviors of people experiencing homelessness as actions rather than status shows some of the weaknesses in *Martin*, and how the decision could be effectively narrowed to not protect unhoused plaintiffs from a wide array of punishment. The Eleventh Circuit's opinion on *Martin* illuminates some of the policy concerns that have led to its mostly narrow reading in district courts.[34]

1. Martin's narrow application in district courts within the Ninth Circuit

Martin has been read narrowly in many district courts, meaning that Eighth Amendment protections have not been granted for people experiencing homelessness. In *Le Van Hung v. Schaaf*, a California District Court denied a preliminary injunction for unhoused plaintiffs.[35] The *Le Van Hung* court focused on two provisions of *Martin*. First, the court stated that Oakland, unlike Boise, did have sufficient shelter beds, reading *Martin's* language on criminalizing sleeping outside without sufficient shelter beds in the surrounding area to mean that if there were sufficient shelter beds, criminalizing sleeping outside was constitutionally valid.[36] The court also reasoned that while *Martin* prohibited the arrest of unhoused individuals from sleeping outside, it did not give people experiencing homelessness the freedom to sleep anywhere they wanted.[37] Therefore, in the *Le Van Hung* court's reasoning, an ordinance mandating an empty park and

[32] Joel v. City of Orlando, 232 F.3d 1353, 1153 (11th Cir. 2000). Importantly in comparison to *Martin*, *Joel* noted that Orlando was able to prove that there was "sufficient space available to homeless residents." Justin Cook, *Down and Out in San Antonio: The Constitutionality of San Antonio's Anti-Homeless Ordinances*, 8 SCHOLAR 221, 233.
[33] *Id.*
[34] *See supra* Section II.A.1.
[35] Le Van Hung v. Schaaf, 2019 WL 1779584 at *4 (N.D. Cal. April 23, 2019).
[36] *Id.*
[37] *Id.* at 4-5.

thereby allowing people experiencing homelessness to have their property seized for sleeping in the park would not be constitutionally deficient under *Martin*.

Other district courts have also read *Martin* in a way that prevents relief for unhoused plaintiffs. In *Carlos-Kahalekomo v. County of Kauai*, the District Court of Hawai'i noted that *Martin* did not require that a city provide sufficient shelter for the homeless, nor did it ban ordinances that prevented people experiencing homelessness from sleeping in certain areas of the city.[38] In sum, the court saw ordinances that criminalized camping or erecting "temporary sleeping quarters" on "any County public park" as separate from an ordinance that criminalized the mere act of sleeping outside.[39]

Martin's reasoning and explicit mention of criminal punishment also leaves open the possibility that civil punishment of unhoused individuals for status crimes will still be permitted in the Ninth Circuit. In *Quintero v. City of Santa Cruz*, a California District Court denied a preliminary injunction for unhoused plaintiffs in part based on the fact that there was no evidence of criminal prosecution.[40] The *Quintero* court also denied relief under *Martin* based on the availability of shelter beds in the city.[41] These cases show a trend towards reading *Martin* narrowly based on both the criminal punishment point and the availability of shelter beds point. Read together, these points could be a death blow to *Martin*.

Other courts have even more explicitly denied relief based on the claim that the Cruel and Unusual Punishment Clause of the Eighth Amendment applies to criminal rather than civil

[38] Carlos-Kahalekomo v. County of Kauai, 2020 WL 4455101 at *3 (D. Haw. August 3, 2020).
[39] *Id.* at 3-5. The Court in *Carlos-Kahalekomo* claimed that this ordinance did not violate *Martin* because it prohibited camping, and therefore did not criminalize "the simple act of sleeping outside." *Id.* at 3. Under this logic, it seems that construction of "any temporary sleeping quarters," construed broadly, could be banned across an entire county. *Id.* at 4.
[40] Quintero v. City of Santa Cruz, 2019 WL 1924990 at *3 (N.D. Cal. April 30, 2019).
[41] Quintero v. City of Santa Cruz, 2019 WL 1924990 at *3 (N.D. Cal. April 30, 2019); *see also* Miralle v. City of Oakland, 2018 WL 6199929 (N.D. Cal. Nov. 28, 2018) (stating that *Martin* did not provide a constitutional right to occupy public property indefinitely).

punishment. In *Aitken v. Aberdeen*, a Washington district court stated that "courts have been reluctant to stretch the ruling beyond its context of total homelessness criminalization."[42] The court limited *Martin* to criminal sanctions, citing *Ingraham v. Wright*, a case where the Supreme Court denied Eighth Amendment Cruel and Unusual Punishment Clause relief to children receiving corporal punishment in school.[43] The court also dismissed an argument on civil fines, stating that the plaintiffs relied on a case involving revoking citizenship, and that the plaintiffs had not appropriately addressed how their punishment under the anti-homelessness ordinances rose to the same level.[44] The court did not mention the Excessive Fines Clause, perhaps due to the recentness of *Timbs*. Still, the court found that there was a possibility of irreparable harm and granted a preliminary injunction, showing that courts may be more open to arguments on civil punishment than they claim to be.[45]

Together, the aforementioned cases show that the reasoning in *Martin* can be manipulated by district courts to deny relief to unhoused plaintiffs, whether it be through the technical availability of shelter beds, the criminalization of sleeping in certain areas of the city, or by reading *Martin* to require criminal prosecution and not cover civil punishment. The easy narrowing of *Martin* to its facts shows a need for further protections for people experiencing homelessness. To expand protections, courts could choose to read *Martin* expansively, provide another constitutional path forward for unhoused litigants, or both. One district court decided to do both.[46]

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[42] Aitken v. Aberdeen, 393 F.Supp.3d 1075, 1081-82 (W.D. Wash. 2019).
[43] Aitken v. Aberdeen, 393 F.Supp.3d 1075, 1081-82 (W.D. Wash. 2019). Other courts have denied Eighth Amendment relief under *Martin* based on the criminal/civil distinction. *See also* Butcher v. City of Marysville, 2019 WL 918203 (E.D. Cal. Feb. 25, 2019) (rejecting a Cruel and Unusual Punishment claim by people experiencing homelessness because they had not faced criminal punishment); Shipp v. Schaaf, 379 F. Supp. 3d 1033 (N.D. Cal. 2019) (rejecting *Martin's* applicability based on the lack of criminal sanctions).
[44] Aitken v. Aberdeen, 393 F.Supp.3d 1075, FN 1 (W.D. Wash. 2019).
[45] Rankin, *supra* note 9, at 16.
[46] *See* Blake v. City of Grants Pass, 2020 WL 4209227 (D. Or. July 22, 2020).

2. Blake v. City of Grants Pass and the Expansion of Protections for People Experiencing Homelessness

In 2019, the District of Oregon struck down an ordinance that banned "camping."[47] *Blake v. City of Grants Pass* read *Martin* expansively and expressly included civil punishment as being within *Martin's* scope.[48] In *Grants Pass*, the court stated that the "Eighth Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal."[49] To reach this conclusion, the court relied on *Austin's* conclusion that *in rem* civil forfeitures constitute punishment, and the Supreme Court's continued affirmation that *Austin's* holding is still good law.[50] *Grants Pass* views the entire Eighth Amendment as applicable to both civil and criminal punishment, and therefore holds the ordinances that civilly punish people experiencing homelessness unconstitutional.[51] *Grants Pass* is currently on appeal, and if its broad reading of *Martin* is overturned, the *Martin* precedent may turn into a paper tiger litigation path for people experiencing homelessness.

Whether or not the *Martin*/*Robinson* reading in the case is overturned, *Grants Pass* provides another option to protect people experiencing homelessness against civil punishment. The court also held that the ordinances at issue were a violation of the Excessive Fines Clause of the Eighth Amendment.[52] The Excessive Fines Clause analysis could allow for a constitutional claim for unhoused plaintiffs that would evade the problems with using the *Robinson* doctrine, such as a narrow interpretation of "status" crimes versus "activity" crimes. This analysis could

[47] *Id.* at *2. The camping ordinance was part of the city's "quality of life" laws, which supposedly serve to "provide safe and livable communities for all residents." *Id.* at *17. In reality, "quality of life" laws do nothing to stop homelessness. *Id.*
[48] Rankin, *supra* note 9, at 16.
[49] Blake v. City of Grants Pass, 2020 WL 4209227 at *8 (D. Or. July 22, 2020).
[50] *Id.* at *9.
[51] *Id.*
[52] *Id.* at *10.

also evade the pitfall of applying the Cruel and Unusual Punishment Clause exclusively to criminal sanctions.

In light of the incorporation of the Excessive Fines Clause, people experiencing homelessness may be able to get relief for civil criminalization of life-sustaining behavior. Section II.B. of this Note explores the kind of relief that unhoused litigants may be able to receive and discusses the potential pitfalls in the application of the Excessive Fines Clause to people experiencing homelessness.

The Role of the Excessive Fines Clause in Ending the Criminalization of Homelessness

SIOBHAN ALLEN*

Over the last decade, the United States has seen a dramatic increase in both homelessness and the laws that criminalize it. This Note contends that the Eighth Amendment's Excessive Fines Clause is a powerful but underutilized tool available to end the criminalization of homelessness.

Part I reviews the history of civil and criminal punishment of homelessness in the United States and of the Excessive Fines Clause. Part II explores the weaknesses of other Eighth Amendment doctrines in their application to people experiencing homelessness. Part III explores the Excessive Fines Clause as a constitutional protection against civil punishment for people experiencing homelessness. This Part also evaluates what constitutes "excessive" and "fine" within the meaning of the Clause, and how proportionality between perpetrator, action, and the amount of a fine factors into the "excessiveness" analysis. Finally, Part IV discusses the benefits and drawbacks of applying the Excessive Fines Clause in conjunction with other Eighth Amendment doctrines as a constitutional framework for people experiencing homelessness. The Note concludes by arguing that the Excessive Fines Clause should be used as a tool to stop the criminalization of homelessness.

INTRODUCTION

On September 11, 2019, Debra Blake was criminally charged and fined for resting in a sleeping bag in a Grants Pass, Oregon public park.[1] Ms. Blake, who had been without housing for ten

* J.D. 2022, Columbia Law School. The author would like to thank her Note Advisor, Professor Kellen Funk, and the staff of the *Columbia Journal of Law & Social Problems* for their guidance, feedback, and editing. Finally, the author would like to thank her family for their tireless support.

1. Blake v. City of Grants Pass, 2020 WL 4209227, at *4 (D. Or. July 22, 2020).

years, needed a place to sleep, eat, and seek shelter from the elements.[2] Nonetheless, citing crimes of illegal camping, "prohibited conduct,"[3] and criminal trespass on city property, the city fined her $885 and banned her from all Grants Pass parks for two weeks.[4] As of July 2020, Ms. Blake owed over $5,000 in unpaid fines.[5]

Theoretically, criminalizing Ms. Blake's homelessness should be unconstitutional. In 1962, the Supreme Court held in *Robinson v. California* that criminalizing a person's status—such as their status as a person addicted to narcotics—violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[6] This so-called *Robinson* doctrine should protect unhoused persons[7] from laws that criminalize them solely for experiencing homelessness.[8] But stories like Debra Blake's persist, and the *Robinson* doctrine has failed to shield unhoused individuals from arrests, fines, and fees imposed solely due to their unhoused status.[9]

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2. *Id.*
3. Ms. Blake's prohibited conduct was lying in a sleeping bag. *Id.*
4. *Id.*
5. *Id.*
6. Robinson v. California, 370 U.S. 660, 667 (1962). In *Robinson*, Lawrence Robinson was convicted under a California law which made it a crime for a person to be "addicted to the use of narcotics." *Id.* at 660.
7. In this Note, I will be using the terms "people experiencing homelessness" and "unhoused persons" interchangeably.
8. *See, e.g.*, Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the* Robinson *Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293 (1995); Jaime Michael Charles, *"America's Lost Cause": The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. PUB. INT. L.J. 315 (2009) (arguing that the *Robinson* doctrine should be construed to include prohibiting punishment of acts related to status).
9. *See* Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URBAN AFF. REV. 41, 43 (2017) [hereinafter Robinson, *No Right to Rest*] (describing how "a punitive approach increasingly defines the policing of homelessness in the United States").

While the scope of this Note covers the Excessive Fines Clause and the *Robinson* doctrine, other current cases show that there are other litigation options for unhoused plaintiffs. These cases include *Bloom v. City of San Diego*, where unhoused plaintiffs have filed a lawsuit against the City of San Diego for ticketing unhoused persons who choose to sleep in their vehicles. *See* Complaint, *Bloom v. City of San Diego*, No. 17-CV-2324, 2017 WL 5499393 (S.D. Cal. Nov. 15, 2017). Additionally, in North Carolina, the National Homelessness Law Center brought suit against Greensboro, North Carolina, on behalf of three Greensboro citizens against a city ordinance to restrict panhandling. *See* Complaint, *National Law Center on Homelessness and Poverty v. City of Greensboro*, 18-CV-00686 (M.D.N.C. Aug. 8, 2018). During the course of the *NLCHP v. Greensboro* litigation, the City of Greensboro repealed the ordinance and the case was dismissed. *See Law Center Litigation*, NAT'L HOMELESSNESS LAW CTR., https://homelesslaw.org/court-cases/ [https://perma.cc/2NG7-VH58].

Punishing people for experiencing homelessness has become widespread as legislatures respond to housing crises not with policies aiming to help those without shelter but rather with ordinances that fine, cite, and jail unhoused persons for living on the street.[10] These laws, ordinances, and practices are collectively referred to as the "criminalization of homelessness."[11] Nationwide, for example, an unhoused person is eleven times more likely to be arrested than a housed person.[12] City laws criminalizing bans on camping in public have also increased by sixty-nine percent over the last decade.[13] Since 2016, twenty-two new laws have been passed banning sleeping in public places, a forty-four percent increase from the sixteen such laws passed during the previous decade.[14] Despite these harsh policies, scholars and advocates agree that the criminalization of homelessness is not effective at reducing homelessness.[15] In fact, these policies create a cycle of poverty where homelessness leads to reduced employment opportunities, family dysfunction, and difficulty meeting basic needs.[16] A lack of housing also leads to mental distress which can

10. Robinson, *No Right to Rest*, *supra* note 9, at 64 ("Quality of life ordinances require unsheltered homeless people to refrain from sleeping, sitting, sheltering, or conducting other acts of living on the streets. . . . Far more common than provision of a service after a quality of life policing contact is citation or arrest."); *see also* Kristin Lam, *Cities Are Criminalizing Homelessness by Banning People from Camping in Public. That's the Wrong Approach, Report Says*, USA TODAY (Dec. 10, 2019), https://www.usatoday.com/story/news/nation/2019/12/10/homeless-camping-bans-criminalization-report/4378565002/ [https://perma.cc/R7LE-GSX6] ("If homeless people refuse to move . . . they may face arrest, fines or warrants.").

11. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 9 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/BRH7-Y9PS].

12. *Id.* at 50.

13. City-wide bans on standing have increased by about 88%, bans on sitting or lying down have increased by 52%, and bans on sleeping in vehicles have increased by 143% since 2006. Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 109–10 (2019).

14. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 12.

15. *See, e.g.*, Jennifer Darrah-Okike, *Why There Are Better Alternatives Than Punitive Policies Targeting Homeless People*, SCHOLARS STRATEGY NETWORK (Apr. 9, 2018), https://scholars.org/brief/why-there-are-better-alternatives-punitive-policies-targeting-homeless-people [https://perma.cc/G4DH-979U]; Andrew Weber, *No Sit/No Lie Citations Handed Out by the Thousands, and Most Go Unpaid*, KUT 90.5 (Oct. 5, 2015), https://www.kut.org/austin/2015-10-05/no-sit-no-lie-citations-handed-out-by-the-thousands-and-most-go-unpaid [https://perma.cc/Y4UH-P2QM]; Raul Aguilar, Comment, *Unconstitutionally Fining: Fining People Experiencing Homelessness in the Era of* Timbs, 53 UIC J. MARSHALL L. REV. 587, 603 (2021) (describing how fining people experiencing homelessness does not work and how most of these fines go unpaid).

16. *See* Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J. F. 430, 436 (2020); *Criminalization of Poverty as a Driver of Poverty in the United States*, HUM.

then lead to mental illness.[17] Thus, the cycle of poverty continues, and unhoused persons continue to receive criminal and civil punishment because they are experiencing homelessness.

The abundance of laws and ordinances criminalizing homelessness have forced courts to take notice.[18] In 2019, for example, Debra Blake joined a class action challenging the laws under which she had been fined for a decade—and won summary judgment on her claim that the local ordinances violated the Eighth Amendment.[19] Ms. Blake's class defeated Grants Pass's ordinances not only under the *Robinson* doctrine, but also under the newly incorporated Excessive Fines Clause of the Eighth Amendment, which prohibits the imposition of excessive fines.[20] This case is currently on appeal to the Ninth Circuit,[21] but its reasoning highlights the Excessive Fines Clause as a tool for advocates of unhoused persons.

This Note argues that advocates for people unhoused people should look beyond the *Robinson* doctrine to the Excessive Fines Clause to more effectively combat the criminalization of homelessness. Part I of this Note reviews the history of punishment of homelessness, both civil and criminal,[22] in the

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RTS. WATCH (Oct. 4, 2017), https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states# [https://perma.cc/AE9T-EN4L]

17. *See* Yong Liu et al., *Relationships Between Housing and Food Insecurity, Frequent Mental Distress, and Insufficient Sleep Among Adults in 12 U.S. States, 2009*, PREVENTING CHRONIC DISEASE 11 (2014).

18. *See, e.g.*, Garcia v. City of Los Angeles, 2020 WL 2129830, at *5–6 (C.D. Cal. Feb. 15, 2020) (discussing illegal seizure claims, due process claims, and vagueness claims against a city ordinance mandating seizure or destruction of "bulky items"); Mass. Coal. for the Homeless v. City of Fall River, 486 Mass. 437 (2020) (reviewing allegations that anti-panhandling statute violated state and federal free speech rights); City of Seattle v. Long, 13 Wash. App. 2d 709 (2020) (holding that the impoundment of an unhoused man's truck was not excessive punishment under the Eighth Amendment); Vigue v. Shoar, 494 F. Supp. 3d 1204, 1232 (M.D. Fla. 2020) (holding that a state statute requiring a government permit for charitable solicitation on public roadways was facially unconstitutional).

19. Blake v. City of Grants Pass, 2020 WL 4209227, at *10 (D. Or. July 22, 2020) (opinion from a magistrate judge on a motion for summary judgement), *appeal docketed*, No. 20-35881 (9th Cir. Oct. 8, 2020).

20. *Id.*

21. Blake v. City of Grants Pass, 2020 WL 4209227 (D. Or. July 22, 2020), *appeal docketed*, No. 20-35881 (9th Cir. Oct. 8, 2020).

22. Civil law "deals with resolving disputes between one entity and another." Will Erstad, *Civil Law vs. Criminal Law: Breaking Down the Differences*, RASMUSSEN UNIV. (Mar. 21, 2022), https://www.rasmussen.edu/degrees/justice-studies/blog/civil-law-versus-criminal-law/ [https://perma.cc/SXM9-SBCM]. Civil laws include government regulations, and the cause of action in civil cases can be brought by the government or a private party. *Id.* The punishment for violating a civil law is usually a financial penalty or an order to

United States and the history of the Excessive Fines Clause. Part II discusses the weaknesses in other Eighth Amendment doctrines—including the *Robinson* doctrine, based in the Cruel and Unusual Punishment Clause—as applied to people experiencing homelessness. Part III explores the possibility of using the Excessive Fines Clause as a constitutional shield against civil punishment for people experiencing homelessness. This includes discussion of the conditions under which a civil punishment is a "fine" within the meaning of the Clause, the definition of "excessive" within the meaning of the clause, and how proportionality between perpetrator of the act, the action, and the amount of a fine factors into the "excessiveness" analysis. Based on this doctrinal foundation, Part IV argues that courts should use the Excessive Fines Clause to stop excessive punishment of unhoused persons. Since the Court held that the Excessive Fines Clause applies to the states only four years ago,[23] courts across the country are applying the Clause for the first time. This Note provides a framework for these courts—and all courts—to apply the Excessive Fines Clause to unhoused persons.

I. THE CRIMINALIZATION OF HOMELESSNESS

Homelessness is both a human rights and public health crisis.[24] On an individual level, it is dehumanizing to a person to have to sleep on the street, be unable to bathe, and even be unable to use the bathroom in private.[25] People experiencing homelessness may be excluded from public transit, other public locations, and employment opportunities based on housing status.[26] Furthermore, being employed does not guarantee that an individual will not experience homelessness.[27] Homeless encampments can also be extremely dangerous for unhoused

change behavior. *Id.* In contrast, criminal actions can only be brought by the government, and individuals found guilty in criminal court face incarceration and probation. *Id.*

23. Timbs v. Indiana, 139 S. Ct. 682 (2019) (incorporating the Excessive Fines Clause through the Due Process Clause of the Fourteenth Amendment).

24. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 36.

25. *Id.* at 98–100.

26. *Id.* at 44–46.

27. Bruce D. Meyer et al., *Learning about Homelessness Using Linked Survey and Administrative Data* 9 (Becker Friedman Inst., Working Paper No. 2021-65, 2021) https://bfi.uchicago.edu/wp-content/uploads/2021/06/BFI_WP_2021-65.pdf [https://perma.cc/BVB4-7XPY] ("A substantial share of people experiencing homelessness are either currently working or were recently employed.").

persons living in them.[28] Beyond individual suffering, homelessness also exacerbates public health crises[29] (such as COVID-19)[30] and contributes to environmental harm.[31] Widespread homelessness is therefore harmful to both the individuals experiencing homelessness as well as the communities in which they live. This pervasive harm requires federal, state, and local government attention.[32]

Unfortunately, the population of unsheltered persons has risen dramatically in the past five years.[33] Rising rents, stagnant wages, and the decline of federally-subsidized housing have led to massive increases in unsheltered populations in the last five years.[34] Tucson, Arizona, for example, processed an average of 52 evictions per day in 2020 compared to its 2019 average of 10 to 30 evictions

28. *See* GIBSON DUNN, *MARTIN V. CITY OF BOISE* WILL ENSURE THE SPREAD OF ENCAMPMENTS THAT THREATEN PUBLIC HEALTH AND SAFETY 8 (2019), https://www.gibsondunn.com/wp-content/uploads/2019/08/Martin-v.-Boise-White-Paper.pdf [https://perma.cc/4UMV-9QN9].

29. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 99.

30. Due to the COVID-19 crisis, public health concerns surrounding homelessness are more important than ever. Organizations that provide aid to people experiencing homelessness in California, Georgia, Massachusetts, and Washington D.C. have been attempting to combat COVID-19 through handwashing stations, restructuring shelters, and providing education about the virus's spread. Jaboa Lake, *Lawmakers Must Include Homeless Individuals and Families in Coronavirus Response*, CTR. FOR AM. PROGRESS (Mar. 18, 2020), https://www.americanprogress.org/issues/poverty/news/2020/03/18/481958/lawmakers-must-include-homeless-individuals-families-coronavirus-responses/ [https://perma.cc/4FPJ-S6JR]. However, these organizations "don't have the resources to fully meet current needs and are especially underprepared to service the communities who are living unsheltered, in encampments, and in emergency and short-term group lodging." *Id.* People experiencing homelessness may be particularly vulnerable to COVID-19, as shelters are often overcrowded and may be experiencing additional shortages in response to COVID-19. *Id.* Additionally, forced encampment closures, or "sweeps" create communication and resource distribution barriers for people experiencing homelessness. *Id.* Sweeps, along with the fact that people experiencing homelessness already have less reliable access to updates about the COVID-19 crisis, prevent unhoused persons from learning critical information about COVID-19. *Id.*

31. *See, e.g.*, GIBSON DUNN, *MARTIN V. CITY OF BOISE* WILL ENSURE THE SPREAD OF ENCAMPMENTS THAT THREATEN PUBLIC HEALTH AND SAFETY 8 (2019), https://www.gibsondunn.com/wp-content/uploads/2019/08/Martin-v.-Boise-White-Paper.pdf [https://perma.cc/4UMV-9QN9] (describing problems of garbage and human waste near homeless encampments).

32. *Solutions*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://www.usich.gov/solutions/ [https://perma.cc/L5ZN-ACTZ].

33. NAT'L ALL. TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2021 EDITION (2021), https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/ [https://perma.cc/8TNS-7SRU].

34. *Id.* ("Since data on homelessness has been collected, unsheltered homelessness has largely trended downward. By 2015, it had dropped by nearly a third. However, over the last five years, there has been a reversal of that trend. The unsheltered population has surged by 30 percent, almost wiping out nearly a decade of previous gains.").

per day.[35] In no state can a person working full-time at the federal minimum wage afford a two-bedroom apartment at the average, fair market rate.[36]

As unhoused populations increase, there is enormous pressure on public officials to solve the problem, even if their solutions are unlikely to fix the root causes of homelessness.[37] This pressure can lead state and local governments to turn to an easy, popular, and poor solution: criminalization.

Criminalization of homelessness, however, is both cruel and ineffective. Criminalization often appeals to the public because it can lower visibility of poverty, not because it is effective in reducing homelessness.[38] First, criminalization is not cost-effective for state and local governments. In 2014, for example, Central Florida spent $31,000 per year for law enforcement and medical costs for every chronically unhoused person, while permanent housing and case managers for each person would cost approximately $10,000 per year.[39] Second, criminalizing homeless only exacerbates its root causes, such as mental health problems.[40] These punishments also fail to solve the underlying problems of inadequate housing supply, low wages, and too few federally-subsidized housing options.[41] Then, Part I.A provides a piece of

35. Rejane Frederick and Jaboa Lake, *Kicking Folks Out While They're Down*, CTR. FOR AM. PROGRESS (July 27, 2020), https://www.americanprogress.org/issues/poverty/reports/2020/07/27/488110/kicking-folks-theyre/ [https://perma.cc/ZC6H-WPJV]. Frederick and Lake also show how homeowners and renters of color in particular are struggling to make rent payments, showing how 13% of white households missed or deferred their June 2020 rent payment, compared to 23% of Hispanic or Latino households and 29% of Black households. *Id.*

36. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2021 (2021), https://reports.nlihc.org/oor/about [https://perma.cc/DP89-X22A]. This study also shows that the two-bedroom housing wage of $24.90 is more than what nearly 60% of all wage workers earn. *Id.* An average minimum wage worker would need to work "nearly 97 hours per week to afford a two-bedroom rental home or 79 hours per week to afford a one-bedroom rental home at the average fair market rent." *Id.*

37. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 56.

38. *See Decriminalizing Homelessness*, HUD EXCHANGE, https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness/ [https://perma.cc/WPG6-RU4A].

39. *Id.* at 26, 72.

40. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15 (stating that the American Medical Association and American Public Health Association have condemned both criminalization of homelessness and sweeps due to stress, loss of sleep, and worsened mental health from these practices).

41. *See* William Yu, UCLA Anderson Forecast, Homelessness in the U.S., California, and Los Angeles, https://www.anderson.ucla.edu/documents/areas/ctr/forecast/reports/uclaforecast_June2018_Yu.pdf [https://perma.cc/45BW-UGE2] (showing that rates of homelessness are linked to housing supply).

the history behind the criminalization of homelessness by reviewing the foundations of civil punishment, and explaining that civil punishment in the United States has been historically used to criminalize Black people, gay people, and poor people.

A. A BRIEF HISTORY OF CIVIL PUNISHMENT

Economic sanctions are a billion dollar industry in the United States, with a lengthy history that predates the nation's founding.[42] English kings used civil fines to "harass . . . foes" and to detain those who were unable to pay.[43] From the founding of the United States, fines became a feature of vagrancy laws, which criminalized "certain types" of people—namely Black people, gay people, and poor people.[44] After the Civil War in particular, Southern states used unpaid fines to force formerly enslaved persons into indentured servitude.[45] Under these vagrancy laws, the government could arrest[46] or civilly punish people, allowing it to maintain social, cultural, political, racial, sexual, economic, and spatial status quos.[47] These laws affected millions of people and demonstrate how law in the United States can be used to punish certain types of people.[48] Part I.B delves further into the punishment of certain types of people through an exploration of the state of civil punishment and its relation to the criminalization of homelessness.

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42. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 22 (2018); Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).
43. *Timbs*, 139 S. Ct. at 688.
44. *See generally* RISA L. GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016) (describing how the Supreme Court came to the conclusion that vagrancy, loitering, and suspicious persons laws were unconstitutional).
45. *Timbs*, 139 S. Ct. at 689.
46. *Id. See also* ACLU, *Ending Modern-Day Debtors' Prisons*, https://www.aclu.org/issues/smart-justice/sentencing-reform/ending-modern-day-debtors-prisons [https://perma.cc/HDM9-YX59]. In the face of "mounting budget deficits" at the state and local level, courts across the country have ordered "the arrest and jailing of people who fall behind on their payments, without affording any hearings to determine an individual's ability to pay or offering alternatives to payment such as community service." *Id.* These modern-day debtors' prisons destabilize the lives of poor people, are "racially-skewed," and ensure that poor people receive longer punishments for committing the same crimes as the rich. *Id.*
47. GOLUBOFF, *supra* note 44, at 3.
48. *Id.* at 3–4.

B. THE LAW OF CIVIL PUNISHMENT

Criminal punishment often receives more attention than civil punishment in part because it triggers greater constitutional and procedural protections.[49] Indeed, criminal prosecution presents the possibility of imprisonment, which triggers the right to counsel.[50] But the civil versus criminal distinction obscures the potential severity of civil punishment. Civil infractions may lead to incarceration for failure to pay fines.[51] To avoid that result and pay their fines, people may forego basic necessities such as food and medicine.[52] Civil punishment can also lead to suspension of driver's licenses, the inability to find a job, and the potential for higher fines in the future.[53] These civil punishments of poverty can lead to an increase in poverty, which leads to a greater likelihood of homelessness.[54] Poverty, civil punishment, and homelessness all exacerbate one another, so in order to assist people experiencing homelessness, scholars and courts should focus on the effects of civil as well as criminal punishment.

The Supreme Court has held that laws *criminalizing* vagrancy, loitering, and suspicious persons are unconstitutional.[55] But *civil* fines[56] are still frequently imposed on people experiencing

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49. *See* Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 368, 370 (2020).

50. *Id.* at 377.

51. *Id.* *See also* COAL. ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 33 (2015), http://www.cohsf.org/Punishing.pdf [https://perma.cc/MN34-TG7D] ("In nearly all cases, citations lead to lengthy and costly court procedures. Citations frequently result in the issuance of an arrest warrant that solidifies a homeless person's criminal status, and sometimes lead to time in jail."); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 51 (noting that "79% of prisoners were denied housing or deemed ineligible for it at some point upon re-entry," and that in Los Angeles, California, "homeless people accounted for 19% of metro arrests").

52. *See* Rankin, *supra* note 49, at 379.

53. *Id.*

54. *Id.*

55. *See* GOLUBOFF, *supra* note 44, at 4.

56. A civil penalty is a "non-criminal remedy for a party's violation of laws or regulations." LEGAL INFO. INST., *Civil Penalties (Civil Fines)* (2020), https://www.law.cornell.edu/wex/civil_penalties_(civil_fines) [https://perma.cc/EXF8-66H6]. Civil penalties usually include civil fines or some other method of financial punishment. *Id.* The Supreme Court devised a test to distinguish between civil and criminal penalties in *United States v. Ward*, 448 U.S. 242 (1980). This test asks (1) Which penalty is the preference of the legislature, and (2) If the intent is civil penalty, will the statute's purpose negate the intention? 448 U.S. at 248–49. If the preference of the statute is a civil penalty, and the purpose does not negate the intention, a fine is considered a civil penalty. *Id.*

homelessness and on visibly poor people.[57] Civil fines punish a wide array of behavior, including panhandling, sleeping in parks, sitting on sidewalks, camping outside, sitting or lying in public, begging, and loitering.[58] These civil punishments can trigger criminal consequences—including incarceration—if a person fails to appear in court or pay a fine.[59] Failure-to-appear and failure-to-pay provisions can also result in prohibitions on obtaining a driver's license, suspensions of driver's and occupational licenses, restrictions on public benefits, and future denial of housing.[60] Fees also perpetuate the cycle of poverty by requiring unhoused people to pay fines when they are already unable to pay for necessities, such as food, transportation, and basic hygiene products.[61] Poverty, in turn, increases the likelihood of criminal behavior, which continues the cycle of poverty.[62] Essentially, these fines create a system of poverty that unhoused people cannot escape. This cycle can entrench people for life in a system that effectively criminalizes their existence, further resigning them to a lifetime of poverty and homelessness.[63]

This level of punishment and suffering comes from civil ordinances and regulations, which reformers often overlook.[64] Criminal punishment triggers certain rights, such as the right to an attorney, while civil punishment does not carry the same protections despite potentially crushing burdens.[65] This leaves a gap in the law where civil punishment can be constitutional even

57. *See generally* JUSTIN OLSON AND SCOTT MACDONALD, HUM. RTS. ADVOC. PROJECT, SEATTLE U. SCH. OF L. WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (2015) (describing Washington ordinances that criminalize homelessness and poverty, including fines, incarceration, and consequent fines that lead to further punishment).

58. *See* Chris Herring et al., *Pervasive Penality: How the Criminalization of Poverty Perpetuates Homelessness*, 1 SOC. FORCES 1, 2 (2019).

59. *See* Rankin, *supra* note 13, at 10–11; NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15.

60. *See* Colgan, *supra* note 42, at 7–8; NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15. *See, e.g.*, COAL. ON HOMELESSNESS, *supra* note 51, at 2 (stating that 69% of unhoused survey respondents had been cited for a "quality of life" citation in the last year, that 90% of those respondents were unable to pay the fine for their last citation, and that, in San Francisco, inability to pay a fine results in a $300 civil assessment fee in addition to the base fine, an arrest warrant, and suspension of one's driver's license).

61. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15, 62.

62. *See* Rankin, *supra* note 13, at 11–12.

63. *Id.* at 12.

64. *Id.* at 2.

65. *Id.*

if it has a devastating effect on unhoused persons, while criminal punishment for the same conduct can be unconstitutional.

II. THE INEFFECTIVENESS OF THE *ROBINSON* DOCTRINE

This Part explores the ineffectiveness of the *Robinson* doctrine in protecting unhoused persons from civil and criminal punishment. Despite its promise to prevent criminalization on the basis of status, the *Robinson* doctrine has proved to be an ineffective solution to the excessive punishment of unhoused persons.[66] The *Robinson* doctrine stems from the Supreme Court's decision in *Robinson v. California*, which prohibited the criminalization of status under the Cruel and Unusual Punishment Clause of the Eighth Amendment, such as the status of being addicted to narcotics.[67] This Part argues that even expansive readings of *Robinson*—such as the Ninth Circuit's decision in *Martin v. City of Boise* disallowing criminalization of homelessness based on the *status* of being unhoused[68]—fail to protect unhoused persons because states and municipalities can continue to criminalize "acts" of homeless or impose civil punishment.

A. THE BACKGROUND OF THE *ROBINSON* DOCTRINE

In 1962, the Supreme Court held in *Robinson v. California* that a California statute making it a criminal offense to be addicted to narcotics constituted cruel and unusual punishment under the Eighth Amendment.[69] Lawrence Robinson had been convicted under the charge of being "addicted to the use of narcotics."[70] The Supreme Court reasoned that the so-called crime of being addicted to drugs was analogous to having a common cold; without any

66. *See generally* Edward J. Walters, Note, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619 (1995) (describing the difference between "acts" and "status" for purposes of the *Robinson* doctrine).

67. Robinson v. California, 370 U.S. 660 (1962). The Supreme Court then narrowed *Robinson* in *Powell v. Texas*, 392 U.S. 514 (1968), where a plurality held that the *Robinson* doctrine did not apply to acts, only status. 392 U.S. at 533–34. This allowed for punishment on the basis of acts that were clearly linked to status, such as a statute in California that allowed punishment on the basis of "camping outside," even if the statute served to punish vagrancy. *See* Walters, *supra* note 66, at 1636 (discussing *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995)).

68. *See infra* Part II.B.

69. *Robinson*, 370 U.S. at 667.

70. *Id.* at 660–61.

"irregular behavior," Robinson could not be punished under the Eighth Amendment.[71] Six years later, the Supreme Court returned to the question of cruel and unusual punishment in *Powell v. Texas*.[72] In *Powell*, Leroy Powell was charged with a violation of a Texas statute prohibiting public drunkenness.[73] This time, the plurality stated that it was Powell's *conduct in public* as a "chronic alcoholic" rather than his status that was being punished.[74] The *Powell* plurality emphasized the difference between "a 'status,' as in *Robinson*, and 'condition'" or conduct, allowing punishment even for "involuntary" conduct related to Powell's alcoholism.[75] While Robinson could not be punished under the "common cold" analogy, Powell's criminal alcoholism caused the Court to use a much harsher analogy: that a prohibition on criminalizing public conduct would prevent a state from convicting a murderer who had a compulsion to kill.[76]

Justice White's concurrence created a slightly different distinction: under the *Robinson* doctrine, status cannot be criminalized, but conduct can be.[77] Justice White stated that in *Powell*, "being drunk in a public place" could be criminalized, whereas in *Robinson* there was no action to criminalize.[78] Justice White's concurrence moved away from the plurality's compulsion argument, and focused on the "status" versus "conduct" distinction.[79] Lower courts have treated Justice White's concurrence as *Powell*'s holding.[80] Under the "status" versus "conduct" distinction, the question becomes whether someone has committed a criminally culpable act—even something as innocuous as appearing in public. Part II.B explores the Ninth

71. *Id.* at 667.
72. Powell v. Texas, 392 U.S. 514 (1968).
73. *Id.* at 517.
74. *Id.* at 531–35.
75. *Id.* at 533–35.
76. Robinson v. California, 370 U.S. 660, 660–61(1962); *Powell*, 392 U.S. at 531–35.
77. *Powell*, 392 U.S. at 548–49 (White, J., concurring).
78. *Id.*
79. *Id.*; *cf.* R. George Wright, *Homelessness, Criminal Responsibility, and the Pathologies of Policy: Triangulating on a Constitutional Right to Housing*, 93 ST. JOHN'S L. REV. 427, 431–32 (2019) (explaining the difference between "status" and "conduct" in *Robinson*).
80. *See* Wright, *supra* note 79, at 431; *see also* Marks v. United States, 430 U.S. 188, 193 (1977) ("[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgements on the narrowest grounds" (internal quotation marks omitted)). See also Bearden v. Georgia, 416 U.S. 660, 666 (1983) (citing Justice Harlan's concurrence as instructive in its holding).

Circuit's application of this distinction in *Martin v. City of Boise*, where that court held that laws criminalizing sitting, sleeping, or lying outside on public property unconstitutionally punish people experiencing homelessness for their status rather than their conduct.[81]

B. *MARTIN V. CITY OF BOISE*'S APPLICATION OF THE *ROBINSON* DOCTRINE TO PEOPLE EXPERIENCING HOMELESSNESS

In *Martin v. City of Boise*, the Ninth Circuit applied *Robinson*[82] and held that punishing people experiencing homelessness for sleeping outside violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.[83] In *Martin*, eleven unhoused plaintiffs sued the city of Boise, arguing that the enforcement of anti-homelessness ordinances in Boise violated their Eighth Amendment rights.[84] One plaintiff, Janet Bell, received a thirty-day sentence after two citations—one for sitting on a riverbank with a backpack, the other for putting down a bedroll in the woods.[85] Another plaintiff, Martin, was cited for resting near a

81. Martin v. City of Boise, 920 F.3d 584, 615–17 (9th Cir. 2019).

82. The *Martin* court's application of the *Robinson* doctrine has proved controversial. *See, e.g.*, West Menefee Bakke, *Against the Status Crimes Doctrine*, 73 SMU L. REV. F. 232, 239 (2020) ("The Ninth Circuit's decision in *Martin* was incorrect. Instead of relegating the status crimes doctrine to the limited context of disease, the Ninth Circuit *expanded* it to cover homelessness." (emphasis added)); Brief for The International Municipal Lawyers Ass'n et al. as Amici Curiae Supporting Petitioners, City of Boise v. Martin, *cert. denied*, 140 S. Ct. 674 (2019) (No. 19-247) (arguing that the Ninth Circuit "improperly expand[ed]" the reach of the Eighth Amendment); John Hirschauer, *Why Didn't the Supreme Court Take This Homelessness Case?*, NAT'L REV. (Jan. 8, 2020), https://www.nationalreview.com/2020/01/why-didnt-the-supreme-court-take-this-homelessness-case/ [on file with the Columbia Journal of Law and Social Problems] (arguing that *Martin* incorrectly combines Justice White's concurrence with the dissenters from *Powell*); Devin R. McDonough, *Constitutional Law: Ninth Circuit Decision Presents Public Health Dilemma with Improper Eighth Amendment Application:* Martin v. City of Boise, 16 J. HEALTH & BIOMEDICAL L. 153, 160 (2020) ("The Ninth Circuit inappropriately concluded that the Eighth Amendment prohibits issuing criminal penalties to those homeless individuals sitting, sleeping, or lying outside on public property when those individuals are incapable of obtaining shelter."). *But see* Joy H. Kim, Note, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1181 (2020) ("Just as the *Robinson* Court prohibited criminalizing addiction, courts should not allow cities to criminalize individuals for sleeping outside if existing shelters in that city bar individuals with substance use disorders.").

83. *Martin*, 920 F.3d at 617.

84. Martin v. City of Boise, 920 F. 3d 584, 615 (9th Cir. 2019); Case Comment, Martin v. City of Boise*: Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public*, 133 HARV. L. REV. 699 (2019).

85. Answer to Plaintiffs' Amended Complaint for Injunctive Relief and Declaratory Relief and Monetary Damages ¶ XI, *Bell*, 834 F. Supp. 2d 1103 (No. 09-CV-540).

shelter.[86] Martin was found guilty at trial and ordered to pay $150.[87] There were also insufficient shelter beds for unhoused individuals in Boise.[88] On these facts, the Ninth Circuit found that sleeping outside was a human necessity if there were insufficient shelter beds, and, under these circumstances, criminalizing sleeping outside was unconstitutional under *Robinson v. California*.[89] This decision was a victory for unhoused plaintiffs but came with complications.

Martin does not offer unhoused persons adequate protection from punishment based on homelessness. *Martin* uses *Robinson*'s distinction between status and action and applies it to the criminalization of homelessness.[90] This creates a distinction between "culpable" homelessness, or conduct that can be punished, and "nonculpable" homelessness, which is a status that cannot be punished.[91] The *Martin* court used this distinction for shelter beds, citing "inevitability, unavoidability, and involuntariness" of prohibited conduct when shelter beds were unavailable.[92] The *Martin* court, however, did not look at accessibility of shelter beds as compared to the particular individual, only availability of shelter beds to the unhoused population as a whole.[93] Furthermore, the *Martin* court did not specify whether its protections extend to civil punishment or exclusively cover criminal punishment,[94] despite that civil fines can cause a wealth of problems for unhoused persons.[95] If people experiencing

86. Martin v. City of Boise, 920 F. 3d 584, 606 (9th Cir. 2019).

87. Amended Complaint for Injunctive Relief and Declaratory Relief and Monetary Damages ¶ XI, *Bell*, 834 F. Supp. 2d 1103 (No. 09-CV-540).

88. Martin v. City of Boise, 920 F. 3d 584, 617 n.8 (9th Cir. 2019).

89. *Id.* at 617.

90. *See* Wright, *supra* note 79, at 437.

91. *Id.*

92. *Id.*

93. *Id.* Excessive bail under the Eighth Amendment is also subject to complications surrounding individualized circumstances. *See* CONG. RSCH. SERV., R45533, U.S. CONSTITUTIONAL LIMITS ON STATE MONEY-BAIL PRACTICES FOR CRIMINAL DEFENDANTS 2 (2019) ("Typically, judges do not assess a detainee's individual characteristics beyond the offense charged; instead, judges set a defendant's bail based on the criminal offense with which he is charged"). *But see* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. F. 1098 (2019) (stating "that unaffordable bail is permissible only when a court finds that release on any other conditions would not reasonably assure the individual's appearance . . . . fuel the current crisis of bail as much as the empirical studies").

94. *See infra* Part II.C.1.

95. *See* Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1501–04 (2020); Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, AM. BAR ASS'N (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs/ [https://perma.cc/

homelessness do not have civil protections under *Martin*, they can easily end up incarcerated for not paying a civil fine just the same as if they had been arrested and criminally charged.[96]

The weaknesses in *Martin* mirror the weaknesses in the *Robinson* doctrine. States may choose to criminalize urinating, sleeping, and eating in public,[97] and a person experiencing homelessness may have no recourse if courts decide that these necessary-for-life activities are conduct rather than status. This razor-thin distinction between status and conduct allows a state to wait for an unhoused person to do something necessary for their survival and criminalize the act as "conduct" rather than "status."[98] States therefore have two potential paths to continue to criminalize homelessness despite *Robinson*—first, to criminalize an "act," or second, to impose a civil punishment.

C. OTHER COURTS' TREATMENT OF *MARTIN V. CITY OF BOISE*

The Fourth and Eleventh Circuits' treatment of *Martin* highlights the ineffectiveness of the *Robinson* doctrine as a legal remedy for people experiencing homelessness. The Fourth Circuit has cited *Martin*'s extension of the *Robinson* doctrine to unhoused persons favorably in *Manning v. Caldwell for City of Roanoke*.[99] In *Manning*, the statutory scheme at issue "authorize[d] Virginia to obtain, in absentia, a *civil* interdiction order against persons it deem[ed] 'habitual drunkards,'" and then "permit[ed] Virginia to

M5Q8-BB4R] ("[T]he court routinely imposed excessive fines and ordered the arrest of low-income residents for failure to appear or to make payments, sometimes despite inadequate notice and also without inquiring into their ability to pay.").

96. In theory, wealth-based barriers to litigation access (especially in criminal cases) violate equal protection. In *Bearden v. Georgia*, the Supreme Court created a four-part test for determining whether a state was violating the rights of indigent offenders. 416 U.S. 660 (1983). The test requires courts to inquire into (1) the nature of the individual interest concerned; (2) the extent to which that interest is impacted by the government policy; (3) whether the nexus between the policy's purpose and means is rational; and (4) whether any alternative means exist to accomplish that purpose. *Id.* at 666. In practice, LFOs (legal financial obligations, such as fines and fees imposed on defendants) are increasingly popular. *See* Louis Fisher, *Criminal Justice User Fees and the Procedural Aspect of Equal Justice*, 133 HARV. L. REV. F. 122 (2020). While scholars have argued that there should be a constitutional guarantee of an "ability to pay" inquiry for fines and fees, LFOs remain in widespread use, partially because they are often related to a government's legitimate interest in funding municipal services. *Id.*

97. *See* Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329, 330 (2005).

98. *Id.* at 346.

99. Manning v. Caldwell for City of Roanoke, 930 F.3d 264, 282 n.17 (4th Cir. 2019).

rely on the interdiction order to *criminally prosecute* conduct permitted for all others of legal drinking age."[100] The declaration of status as a "habitual drunkard" was a civil designation that led to criminal punishment for possession or attempted possession of alcohol.[101] The Fourth Circuit construed this as cruel and unusual punishment under the *Robinson* doctrine, and stated that the only other Circuit Court to face this issue had been the Ninth Circuit in *Martin*, which came to the "same conclusion" as the Fourth Circuit.[102] But the Fourth Circuit's reasoning suffers from the same deficiencies as *Martin*, and it struck down Virginia's statutory scheme because that scheme explicitly criminalized status.[103] Even this positive reading of Martin does not provide protection for people experiencing homelessness.[104]

The Eleventh Circuit has also expressly declined to follow *Martin*'s reasoning, citing public health concerns and describing the criminalization of people experiencing homelessness as a prohibition on "conduct" rather than "status."[105] In *Joel v. City of Orlando*, the Eleventh Circuit placed heavy emphasis on the city's interest in "aesthetics, sanitation, public health and safety."[106] The Eleventh Circuit's ability to categorize the behaviors of people experiencing homelessness as conduct rather than status are demonstrative of the weaknesses in *Martin* and how the decision could be effectively narrowed to not protect unhoused plaintiffs from a wide array of punishment. The Eleventh Circuit's reading of *Martin* illuminates the anti-homelessness policy concerns that have led to its mostly narrow reading in district courts.

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100. *Id.* at 268 (emphasis added).
101. *Id.* at 268–69.
102. *Id.* at 282 n.17.
103. The statutory scheme in Manning punished those who qualified, in the eyes of the court, as "habitual drunkards." *Id.* at 268.
104. An Ohio district court has also cited favorably to *Martin*. *See* Phillips v. City of Cincinnati, 2019 WL 2289277, at *2 n.6 (S.D. Ohio May 29, 2019). Although the court did not address unhoused plaintiffs Eighth Amendment claims at length in *Phillips v. City of Cincinnati*, the court did say that plaintiffs would be likely to succeed on an Eighth Amendment claim if they could show that there were not available shelter beds, citing to *Martin*, as the Sixth Circuit had not yet addressed this issue. *Id.*
105. Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000). Importantly, in comparison to *Martin*, *Joel* noted that the city of Orlando was able to prove that there was "sufficient space available to homeless residents." See Justin Cook, Comment, *Down and Out in San Antonio: The Constitutionality of San Antonio's Anti-Homeless Ordinances*, 8 SCHOLAR: ST. MARY'S L. REV. ON MINORITY ISSUES 221, 234 (2006).
106. *See Joel*, 232 F.3d at 1358.

1. Martin*'s Narrow Application in District Courts Within the Ninth Circuit*

Under *Martin*, courts have denied Eighth Amendment protections for people experiencing homelessness. In *Le Van Hung v. Schaaf*, the United States District Court for the Northern District of California refused to enjoin the City of Oakland from clearing an encampment of persons experiencing homelessness from a local park.[107] The *Le Van Hung* court focused on two provisions of *Martin*. First, the court noted that, while *Martin* forbids the arrest of people experiencing homelessness for living in public places, Oakland's plan to clear the park encampment did not require the arrest of any people experiencing homelessness. Therefore, the court concluded that there was no Eighth Amendment issue with Oakland's plan to clear the park because it did not criminalize sleeping in the park.[108] The court also reasoned that while *Martin* prohibited the arrest of unhoused individuals because of sleeping outside when there is nowhere else for them to go, it did not give people experiencing homelessness the freedom "to occupy indefinitely any public space of their choosing."[109] Furthermore, the court reasoned that even if there were insufficient shelter beds, there was no criminalization because the ordinances did not require arrests.[110] Therefore, under the *Le Van Hung* court's reasoning, an ordinance mandating an empty park and authorizing seizures would be constitutional, even if there were not sufficient shelter beds in the city.

Other district courts have also read *Martin* in a way that denies relief for unhoused plaintiffs. In *Carlos-Kahalekomo v. County of Kauai*, the United States District Court for the District of Hawaii noted that *Martin* did not require that a city to provide sufficient shelter for the homeless, nor did it ban ordinances that prevented people experiencing homelessness from sleeping in certain areas of the city.[111] In sum, the court saw ordinances that criminalized camping or erecting "temporary sleeping quarters" on "any County

107. Le Van Hung v. Schaaf, 2019 WL 1779584, at *7–8 (N.D. Cal. Apr. 23, 2019). The court did, however, grant a preliminary injunction requiring the city to follow its own policies when clearing the park. *Id.*
108. *Id.* at *4–5.
109. *Id.* at *4–5.
110. *Id.* at *4.
111. Carlos-Kahalekomo v. County of Kauai, 2020 WL 4455101, at *3 (D. Haw. Aug. 3, 2020).

public park" as separate from an ordinance that criminalized the mere act of sleeping outside.[112]

Martin's reasoning and explicit mention of criminal punishment also leaves open the possibility that civil punishment of unhoused individuals for status crimes will still be permitted in the Ninth Circuit. In *Quintero v. City of Santa Cruz*, decided just a week after *Le Van Hung*, the United States District Court for the Northern District of California again refused to enjoin a city from closing an encampment of people experiencing homelessness; with no evidence of criminal prosecution, the plaintiffs had no criminalization from which to obtain relief.[113] The *Quintero* court also denied relief under *Martin* based on the availability of shelter beds in the city.[114] These cases show a trend towards reading *Martin* narrowly based on both the criminal punishment point and the availability of shelter beds point. Read together, these points show that *Martin* rests on narrow reasoning.

Other courts, however, have shown that the logic of *Martin* may extend beyond the criminal context. In *Aitken v. Aberdeen*, the United States District Court for the District of Washington stated that "courts have been reluctant to stretch the ruling beyond its context of total homelessness criminalization."[115] But the *Aitken* court acknowledged the possibility that *Martin* could extend to criminal sanctions.[116] The court noted an apparent conflict with *Ingraham v. Wright*, a case in which the Supreme Court denied Cruel and Unusual Punishment Clause relief to children receiving corporal punishment in school because the punishment did not involve violation of a criminal statute, and *Austin v. United States,* an Excessive Fines Clause case, reasoning that the Eighth Amendment "cuts across the division between the civil and the criminal law."[117] The court then stated that it was "unwilling to

112. *Id.* at *3–5. The court in *Carlos-Kahalekomo* claimed that this ordinance did not violate *Martin* because it prohibited camping, and therefore did not criminalize "the simple act of sleeping outside." *Id.* at *3. Under this logic, it seems that construction of "any temporary sleeping quarters," construed broadly, could be banned across an entire county. *Id.* at *4.

113. Quintero v. City of Santa Cruz, 2019 WL 1924990, at *3 (N.D. Cal. April 30, 2019).

114. *Id.*; *see also* Mirralle v. City of Oakland, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018) (stating that *Martin* did not provide a constitutional right to occupy public property indefinitely).

115. Aitken v. Aberdeen, 393 F. Supp. 3d 1075, 1081–82 (W.D. Wash. 2019).

116. *Id.*

117. *Id.* at 1082. Other courts have denied Eighth Amendment relief under *Martin* based on the criminal/civil distinction. *See, e.g.*, Butcher v. City of Marysville, 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019) (rejecting a Cruel and Unusual Punishment claim

hold definitely that Martin's rationale cannot extend" to sweeping civil anti-camping ordinances.[118] The court did not mention the Excessive Fines Clause, perhaps due to the fact that *Timbs v. Indiana* had incorporated it only four months earlier.[119] Still, the court found that there was a possibility of irreparable harm and granted a preliminary injunction stopping enforcement of anti-homeless ordinances,[120] showing that courts are potentially open to arguments on civil punishment.[121]

Together, these cases show that *Martin*'s reasoning is easily limited, whether it be through the technical availability of shelter beds, the criminalization of sleeping in certain areas of the city, or by reading *Martin* to apply only to criminal prosecution. The easy narrowing of *Martin* to its facts shows a need for stronger constitutional protections for people experiencing homelessness. To expand protections, courts could choose to read *Martin* expansively or provide another constitutional path forward for unhoused litigants. One district court decided to do both.[122]

2. Blake v. City of Grants Pass *and the Expansion of Protections for People Experiencing Homelessness*

Blake v. City of Grants Pass, a 2019 case from the United States District Court for the District of Oregon, reads *Martin* in a way that provides comprehensive protections for unhoused persons. In *Grants Pass*, the court struck down ordinances that banned "camping" in the city of Grants Pass.[123] The court read *Martin* expansively and expressly included civil punishment within *Martin*'s scope.[124] The court also stated that the "Eighth

by people experiencing homelessness because they had not faced criminal punishment); Shipp v. Schaaf, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019) (rejecting *Martin's* applicability based on the lack of criminal sanctions). *Austin* and its relationship to civil punishment is explored more fully in Part III.A.

118. *Aitken*, 393 F. Supp. 3d at 1082.

119. *See* Timbs v. Indiana, 139 S. Ct. 682 (2019).

120. *Aitken*, 393 F. Supp. 3d at 1085–86.

121. *See* Rankin, *supra* note 49, at 383.

122. *See* Blake v. City of Grants Pass, 2020 WL 4209227, at *5, *10, *11 (D. Or. July 22, 2020).

123. *Id.* at *1, *2. The ordinances at issue included Grants Pass Municipal Codes ("GPMC") 5.61.020 (the "anti-sleeping ordinance"); GPMC 5.61.030 and GPMC 6.46.090 (the "anti-camping ordinances"), GPMC 6.46.350 (the "park exclusion ordinance"), which prohibited, in relevant part, bedding and sleeping bags "maintained for the purpose of maintaining a temporary place to live." Grants Pass Municipal Code 5.61.020.

124. *See* Rankin, *supra* note 13, at 16.

Amendment prohibits cruel and unusual punishment whether the punishment is designated as civil or criminal."[125] To reach this conclusion, the court relied on Supreme Court precedent stating that *in rem* civil forfeitures constitute fines for the purpose of the Eighth Amendment "when they are at least partially punitive."[126] *Grants Pass* viewed the entire Eighth Amendment as applicable to both civil and criminal punishment, and therefore held that ordinances that civilly punish the status of people experiencing homelessness are unconstitutional.[127] *Grants Pass* is currently on appeal, and if its broad reading of *Martin* is overturned, the *Martin* precedent becomes a less effective path forward for unhoused persons.

Grants Pass provided another avenue, however, to protect people experiencing homelessness against civil punishment—the Excessive Fines Clause. The court held that the ordinances at issue were a violation of the Cruel and Unusual Punishment Clause *and* the Excessive Fines Clause of the Eighth Amendment.[128] The Excessive Fines Clause could allow a constitutional claim for unhoused plaintiffs that would evade the problems posed by the *Robinson* doctrine, such as a narrow interpretation of "status" crimes versus "activity" crimes. This analysis could also evade the pitfall of applying the Cruel and Unusual Punishment Clause exclusively to criminal sanctions. Considering the recent incorporation of the Excessive Fines Clause, people experiencing homelessness may be able to win relief for civil punishment of life-sustaining behavior. Part III of this Note explores the kind of relief that unhoused litigants may be able to receive and discusses the potential pitfalls in the application of the Excessive Fines Clause to people experiencing homelessness.

III. THE EXCESSIVE FINES CLAUSE AS A PATH FORWARD FOR PEOPLE EXPERIENCING HOMELESSNESS

This Part explores the framework of the Excessive Fines Clause and its potential application to unhoused litigants. Part III.A begins by examining how the history of the Excessive Fines Clause

125. *Blake*, 2020 WL 4209227, at *8.
126. *Id.* at *9 (describing the Supreme Court's conclusions in *Austin v. Texas*, 509 U.S. 602 (1993)).
127. *Id.*
128. *Id.* at *10.

may provide context for its application. Part III.B then analyzes the two requirements for the Clause to apply—that the policy (1) impose a fine that is punitive and (2) that it be "excessive"—and explores how the Clause applies to homelessness. Part III.C concludes that the punishment unhoused litigants on the basis of their housing status face falls within the bounds of the Excessive Fines Clause, and that courts should use an individualized inquiry when determining whether or not a fine on an unhoused person is excessive.

A. THE HISTORY OF THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE AS A PROTECTION AGAINST CIVIL FINES

Although there is limited Supreme Court jurisprudence on the Excessive Fines Clause,[129] the Clause has a lengthy history that should inform how courts and advocates have employed it. The Clause is short, stating only a prohibition against "excessive fines imposed."[130] The Court did not invoke the Clause until 1989 in *Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal, Inc.*, holding that punitive damages did not violate the Excessive Fines Clause.[131] and has only addressed the question of excessiveness once, in *United States v. Bajakajian*.[132] Furthermore, the Court only incorporated the Excessive Fines Clause against the states in 2019,[133] meaning that, for much of American history, state courts could contribute little to the Clause's meaning. As a result, the Clause's exact requirements and limitations remain largely undefined.

Notwithstanding scant jurisprudence, the Excessive Fines Clause has a strong foundation in American civil rights and civil liberties.[134] Its origins trace back to the Magna Carta,[135] which

129. *See* Colgan, *supra* note 42, at 10.
130. U.S. Const. amend. VIII.
131. Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal, Inc, 492 U.S. 257, 259–60 (1989); *see also* Deborah F. Buckman, *When Does Forfeiture of Motor Vehicle Pursuant to Federal Statute Violate Excessive Fines Clause of Eighth Amendment*, 169 A.L.R. Fed. 615, § 2[a] (2001).
132. *See* Buckman, *supra* note 131, at § 2[a]; United States v. Bajakajian, 524 U.S. 321 (1998). *See infra* Part III.A.
133. *See* Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019).
134. *Id.* at 687–90 (describing the history of the Excessive Fines Clause).
135. The Magna Carta was a charter of liberties to which the English King John gave his assent in June 1215. *Magna Carta*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/Magna%20Carta [https://perma.cc/NT2C-QYB6].

required that economic punishment be proportionate to the wrong it sought to punish and not deprive people of their livelihoods.[136] The English Bill of Rights also contained a provision that excessive fines should not be imposed.[137] Early American settlers brought this provision to the colonies, and was written into the Virginia Declaration of Rights.[138] By 1787, eight state constitutions had similar provisions.[139] By 1868, thirty-five of thirty-seven states had provisions prohibiting excessive fines.[140] By 1868, thirty-five of thirty-seven states had provisions prohibiting excessive fines.[141] Currently, all fifty states either prohibit excessive fines or require proportionality for fines in their constitutions.[142]

Given the Clause's strong foundation, the Supreme Court has been willing to view what constitutes a fine broadly. In *Austin v. United States*, the Supreme Court held that *in rem* civil forfeitures[143] fell within the scope of the Excessive Fines Clause.[144] In *Austin*, Richard Austin was arrested and indicted for possessing cocaine with intent to distribute.[145] After his arrest, the United States filed an *in rem* action seeking forfeiture of Austin's home and business.[146] Austin argued that this was a violation of the

136. *Timbs*, 139 S. Ct. at 687; *English Translation of Magna Carta*, BRITISH LIB. (Jul. 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/2PST-JMLM].

137. *Timbs*, 139 S. Ct. at 688; *English Bill of Rights 1689*, AVALON PROJECT (2008), https://avalon.law.yale.edu/17th_century/england.asp [https://perma.cc/3DZV-HLKA] ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

138. *Timbs*, 139 S. Ct. at 688; *The Virginia Declaration of Rights*, NAT'L ARCHIVES (Sep. 29, 2016), https://www.archives.gov/founding-docs/virginia-declaration-of-rights [https://perma.cc/26PU-HEC9] ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

139. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019).

140. *Id.*

141. *Id.*

142. *Id.* at 689.

143. An *in rem* civil forfeiture describes an action brought in court against property. *See Types of Federal Forfeiture*, U.S. DEP'T OF JUST. (Feb. 17, 2022), https://www.justice.gov/afms/types-federal-forfeiture [https://perma.cc/8WCC-VXHU].

144. Austin v. United States, 509 U.S. 602, 602 (1993). The Court has, however, also held that civil forfeitures do not constitute punishment *for the purposes of the Double Jeopardy Clause*. United States v. Ursery, 518 U.S. 267, 285–86 (1996). The Court distinguished the Double Jeopardy Clause from the Excessive Fines Clause, acknowledging that the "categorical approach under the Excessive Fines Clause [is] wholly distinct" from civil forfeitures in other constitutional contexts. *Id.*

145. *See* Austin v. United States, 509 U.S. 602, 604 (1993); Robin M. Sackett, *The Impact of* Austin v. United States*: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495, 505 (1994).

146. *Id.*

Eighth Amendment's Excessive Fines Clause, and the Supreme Court agreed that a civil *in rem* proceeding could be a violation of the Excessive Fines Clause.[147] The Court focused its analysis on whether "the forfeiture was monetary punishment," rather than whether the proceeding was civil or criminal.[148] Instead of focusing on the nature of the punishment, the Court turned its attention to the history of the Eighth Amendment, noting that the Excessive Fines Clause limits the government's ability to "extract payments" whether civil or criminal.[149] In the case of *in rem* civil forfeitures, the United States has a long tradition of requiring property forfeiture for the violation of criminal and civil statutes, and the forfeiture of property involved in both was considered punitive.[150] While civil forfeitures were traditionally based on the legal fiction that the property was the guilty party, the Court noted that the intent of the forfeiture was to punish the owner for their culpability or complicity in the criminal or civil violation.[151] In sum, the Court determined that civil forfeitures, a type of civil sanction, could be considered fines and placed them under the purview of the Excessive Fines Clause.[152]

While *Austin* mostly limited its discussion to civil *in rem* forfeitures, the Court cited other forms of civil punishment twice, suggesting that they could also fall within the scope of the Excessive Fines Clause.[153] First, the Court noted that forfeitures were listed alongside other provisions for punishment, and the word "forfeiture" was a substitution for fine, providing evidence of punitive intent.[154] Second, the Court noted that forfeiture provisions bolstered statutory fines provisions and imprisonment, showing further evidence of punitive intent.[155]

The Court's analysis has since been complicated by Justice Thomas's majority opinion in *United States v. Bajakajian*, which reaffirmed *Austin*'s holding while simultaneously asserting that

147. *Id.* at 506.
148. *Austin*, 509 U.S. at 610.
149. *Id.*
150. *Id.* at 613–616.
151. *See* Colgan, *supra* note 42, at 19.
152. *Id.*
153. *Id.* at 19–20. The Court noted the relationship between economic sanctions and other forms of punishment, as well as "Congress's recognition that forfeiture would supplement statutory fines and imprisonment." *Id.* (citing Austin v. United States, 509 U.S. 602, 614–20 (1993)).
154. *Id.*; Austin v. United States, 509 U.S. 602, 614 (1993).
155. *See* Colgan, *supra* note 42, at 19.

traditional *in rem* forfeitures were "not considered punishment against the individual for an offense."[156] However, Justice Thomas' statement is not historically accurate, as court and statutory records in the United States from 1773 and onwards described sanctions as penal in nature, or expressly used them to punish malicious conduct.[157] Additionally, Justice Thomas, concurring in a recent denial of a writ of certiorari, wrote that "[m]odern civil forfeiture statutes are plainly designed, at least in part, to punish the owner of property used for criminal purposes."[158] Based on Justice Thomas's more recent statement, the Court's stance appears to be consistent with its prior precedent—civil forfeiture statutes may be, at least in part, punitive.

The Supreme Court most recently invoked the Excessive Fines Clause in 2019 in *Timbs v. Indiana*, which incorporated the Excessive Fines Clause through the Fourteenth Amendment.[159] In *Timbs*, Tyson Timbs pled guilty to a drug offense in Indiana.[160] As a result, he was sentenced to home detention followed by probation.[161] In addition to his detention, the state authorized the forfeiture of Timbs' car, a vehicle worth four times more than the maximum fine he could have received for the crime.[162] The determination of whether or not Timbs had been excessively fined centered on the forfeiture of his car, and the Court expressly incorporated the Eighth Amendment to include civil *in rem* forfeitures as fines.[163] On remand, the Indiana Supreme Court repeatedly noted that Timbs used his car to meet basic needs, including food, shelter, and medical care.[164] This shows that lower courts are willing to consider the importance of an item to the defendant in civil forfeiture actions, which could be the start of a

156. United States v. Bajakajian, 524 U.S. 321, 331 (1998).
157. *See* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal. L. Rev. 277, 313–315 (2014) ("[B]eyond nomenclature, statutory language often reflected an understanding that sanctions that served remedial purposes were, in fact, punishment[.]").
158. Leonard v. Texas, 137 S. Ct. 847, 847 (2017) (statement of Thomas, J., respecting the denial of certiorari); Colgan, *supra* note 42, at 17 n.87.
159. Timbs v. Indiana, 139 S. Ct. 682, 684 (2019) (incorporating the Eighth Amendment's Excessive Fines Clause to the States through the Fourteenth Amendment).
160. *Id.* at 686.
161. *Id.*
162. *Id.*
163. *Id.* at 690.
164. *See* Colgan & McLean, *supra* note 16, at 432 (describing how on remand, the Indiana Supreme Court considered the magnitude of the punishment on the individual to determine excessiveness).

shift towards considering the plaintiff's life situation to determine whether a civil forfeiture violates the Excessive Fines Clause.[165]

The Indiana court's analysis also highlights the reasons that the Court felt it was necessary to incorporate the Clause. Justice Ginsburg wrote that the "historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is . . . overwhelming."[166] The Clause's background in English law, colonial era provisions, and state constitutions showed that the protections guaranteed by the Clause were fundamental.[167] Furthermore, Justice Ginsburg stated that civil in rem forfeitures fell within the scope of the Clause when they are at least partially punitive.[168] With the recent incorporation of the Excessive Fines Clause and the analysis in *Timbs*, advocates have a new tool to challenge excessive civil in rem forfeitures related to the criminalization of homelessness.

B. THE PUNITIVE REQUIREMENT

Part III.C focuses on the punitive requirement under the Excessive Fines Clause. Punitive fines trigger the Excessive Fines Clause, whereas non-punitive economic sanctions do not.[169] A punitive economic sanction need be only "partially punitive" to be considered constitutionally punitive, and therefore a "fine," under the Clause.[170] Whether or not a sanction is "partially punitive" can be determined either through a showing that the sanction is linked to the prohibited conduct or through a showing that the sanction is treated like other forms of punishment.[171] If a sanction meets either of these standards, it is partially punitive, and therefore a "fine" that can be analyzed under the Excessive Fines Clause.[172]

The Supreme Court created the partially punitive requirement in *Austin v. United States*, which established that civil in rem forfeitures could be considered under the Excessive Fines

165. *Id.*
166. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019).
167. *Id.* at 688.
168. *Id.* at 690.
169. *See* Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 163 (1995).
170. *See* Colgan, *supra* note 42, at 18 (describing the requirement for partially punitive under *Austin*).
171. *Id.* at 19.
172. *Id.*

Clause.[173] In *Austin*, the Court concluded that a forfeiture of Austin's mobile home and auto body shop was punitive based on the historical link between civil forfeitures and wrongful conduct.[174] The Court noted that forfeitures of property were historically intended to ascribe the offender's wrongdoing to the property itself, thus making the property an instrumentality in the offense and its forfeiture appropriate punishment.[175] The Court also examined the history of civil forfeitures, and noted that they were traditionally listed alongside other forms of punishment.[176] Because the Excessive Fines Clause only applies to fines intended by legislatures to punish wrongdoing, the fine's *amount*—such as a hefty tax intended to incentivize rather than punish—would not constitute a fine but a smaller fee aimed at punishing would.[177]

Laws that criminalize homelessness, including quality of life laws such as the one at issue in *Grants Pass*, are at least partially punitive. Legislatures use these statutes and ordinances to regulate behavior that cannot otherwise "be classified as serious crime,"[178] aiming to protect public order and to allow society to ban conduct which it finds offensive[179] such as begging, sleeping outdoors, and public camping.[180] These bans are, however, also often deliberately designed to forcibly remove—indeed, punish—people experiencing homelessness from public spaces.[181]

Beyond immediate removal, quality of life laws also have the ripple effect of increasing financial insecurity, limiting access to

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173. Austin v. United States, 509 U.S. 602 (1993).

174. Austin v. United States, 509 U.S. 602, 604 (1993). The Court held only that forfeiture of property *could* be excessive under the Excessive Fines Clause, and remanded on the issue of whether or not the forfeiture was actually punitive. *Id.*

175. *Id.* at 612, 615.

176. *See* Colgan, *supra* note 42, at 19.

177. *See id.* at 20 n.106; R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007) (describing wrongdoing leading to criminal responsibility).

178. Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 ST. JOHN'S L. REV. 1367, 1367 (1998).

179. *See generally* Christine L. Bella & David L. Lopez, Note, *Quality of Life—At What Price? Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89 (1994) (discussing the impact of quality of life laws on people experiencing homelessness).

180. *See, e.g.*, *id.* at 92; Blake v. City of Grants Pass, 2020 WL 4209227, at *17 (D. Or. July 22, 2020) (describing the fines at issue).

181. *See* Christine L. Bella & David L. Lopez, Note, *Quality of Life—At What Price? Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT. 89, 91 (1994) ("These efforts have ranged from the enforcement of noncontroversial ordinances regulating such conduct as littering and excessive noisemaking, to regulations that essentially 'criminalize' the often involuntary state of homelessness.").

jobs, and stigmatizing unhoused persons.[182] These laws also lead to ticketing and arrests of people experiencing homelessness,[183] including Debra Blake in *Grants Pass*.[184] These ordinances are, at their core, designed as punitive "sticks" to decrease homelessness.[185] Critics may argue that these fines are not punitive, and are rather intended as incentives to protect public safety. But this is not the inquiry under the Clause. The appropriate inquiry under the Clause is whether the fine is at least *partially* punitive, not whether the fine serves no remedial purpose.[186] Because of the innately punitive nature of laws criminalizing homelessness, the "partially punitive" test for the Eighth Amendment's Excessive Fines Clause would likely be easily met, and these laws' concomitant financial penalties would likely be considered "fines" under the meaning of the Clause.

C. THE EXCESSIVENESS STANDARD

The following Part explains the requirement that a fine be "excessive" in order for it to be unconstitutional under the Excessive Fines Clause. In *United States v. Bajakajian*, the Supreme Court applied a "gross disproportionality" standard, first developed in *Solem v. Helm*, to determine the excessiveness of a fine.[187] Courts have interpreted the gross disproportionality standard to weigh the fine's appropriateness in light of "the nature of [the] offense, the nature of [the] sentence, and the sentence [the offender] could have received in other States for the same offense."[188] This allows defendants to show gross disproportionality through jurisdictional comparison or by through a comparison of the punishment and the offense. At the time of *Bajakajian*, the Court did not address the issue of the financial

182. *See generally* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11 (describing the impact of homelessness nationwide).
183. *See* Robinson, *No Right to Rest*, *supra* note 9, at 42–43.
184. *Blake*, 2020 WL 4209227, at *11.
185. *See* Robinson, *No Right to Rest*, *supra* note 9, at 66.
186. Austin v. United States, 509 U.S. 602, 610 (1993) ("We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause.").
187. United States v. Bajakajian, 524 U.S. 321, 322 (1998).
188. Solem v. Helm, 463 U.S. 277, 284 (1983); *see generally* Nancy Keir, *Solem v. Helm: Extending Judicial Review Under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences*, 33 CATH. U. L. REV. 479 (1984) (describing proportionality in light of *Solem v. Helm*).

burden on the defendant.[189] Part III.C.1 further explains the gross disproportionality standard.

1. *The Gross Disproportionality Standard*

Fines criminalizing homelessness should be considered grossly disproportional to the offense. The gross disproportionality standard weighs the seriousness of an offense against the seriousness of the punishment.[190] The proportionality analysis in the Excessive Fines Clause derives from the Cruel and Unusual Punishment Clause of the Eighth Amendment[191] in which the Supreme Court compares the punishment actually imposed to the punishment that *could* have been imposed in other jurisdictions for the same crime.[192] As applied to unhoused litigants, the proportionality analysis likely presents and obstacle for unhoused litigants because as approximately 72 percent of cities have laws prohibiting camping in public, and there has been an approximately 70 percent increase in anti-camping laws since 2006.[193]

Fortunately, litigants can also establish gross disproportionality by comparing the punishment to the offense. In the context of homelessness, therefore, litigants can establish that the fines are grossly disproportionate to their minor offenses, as was the case in *Bajakajian*. The Supreme Court has given more weight to the proportionality between the offense and the punishment in the context of fines and forfeitures than it has in the imprisonment context.[194] Unfortunately, lower courts have not

189. United States v. Bajakajian, 524 U.S. 321 n.15 (1998).
190. *See* Colgan, *supra* note 42, at 11.
191. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 688 (2005).
192. *See* Charles Doyle, CONG. RSCH. SERV., LSB10196, ARE EXCESSIVE FINES FUNDAMENTALLY UNFAIR? 2 (2019). While further expansion on the Cruel and Unusual Punishment Clause is beyond the scope of this Note, it is by no means a settled area of the law. *See, e.g.*, Alex Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1917 (2018) (describing Supreme Court jurisprudence on Eighth Amendment proportionality doctrine).
193. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 12.
194. *See* Melissa A. Rolland, Case Comment, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371, 1383 (1999) ("[T]he Court noted that two separate analyses are required in criminal forfeiture cases, because the Cruel and Unusual Punishments Clause does not require any proportionality review of a sentence less than life imprisonment without the possibility of parole, but the Excessive Fines Clause requires a proportionality review in every case to determine if a fine is excessive" (citation omitted)).

been consistent in applying proportionality between the offense and the punishment. For example, the Fourth Circuit focuses its analysis on whether property was an instrumentality in the offense, whereas the Eighth Circuit uses a proportionality test.[195] Accordingly, advocates should urge courts to follow faithfully the Supreme Court's analysis in *Bajakajian*, considering the proportionality between the offense and the fine.

In the Excessive Fines Clause's proportionality analysis, the seriousness of the offense is key.[196] The fine itself often reflects the seriousness of the offense. The fine for the first violation of a municipal ordinance, for example, might be $100, whereas a fourth violation might be $400.[197] Fines may also have statutory maximums or minimums that reflect a defendant's ability to pay or are enhanced based on a previous criminal record.[198] Consideration of previous records merits special attention in the context of unhoused litigants, as the criminalization of homelessness entails fines and fees for small offenses, such as sleeping outside.[199] For repeat offenders, when the fine is deeply disproportionate to the offense, it should be a violation of the Excessive Fines Clause. Part III.C.2 discusses another consideration under the Clause, individual characteristics of the offender and the offender's ability to pay.

2. *Individual Characteristics & Ability to Pay*

Courts should consider an individual's characteristics—namely, ability to pay—when considering the excessiveness of a fine. Whether excessiveness turns on the fine's collateral consequences or an individual's ability to pay remains unsettled:[200]

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195. *Id.* at 1386–87; United States v. Chandler, 36 F.3d 358 (4th Cir. 1994); United States v. 9638 Chicago Heights, 27 F.3d 327 (8th Cir. 1994).

196. *See* Colgan, *supra* note 42, at 48.

197. *See, e.g.*, SEDRO-WOOLLEY, WA., MUN. CODE § 18.30.060.C (2022) (directing city directors to consider "repeat violations" when deciding to issue a notice of violation in lieu of a notice of infraction); TWP. OF HAMILTON, N.J., GEN. LEGIS. § 224-5 D (2016) (stating that a repeat offender "shall be sentenced by the court to an additional fine as a repeat offender").

198. *See generally* Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53 (2017) (describing considerations for a system of gradation for civil fines and its implementation).

199. *See generally* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11 (showing statistics for the criminalization of homelessness, including laws regulating begging, sleeping, and camping outside).

200. *See* Colgan & McLean, *supra* note 16 (advocating for an ability to pay based framework for the Excessive Fines Clause). *Bearden v. Georgia*, 416 U.S. 660 (1983), is "the

the Supreme Court has yet to address the question, leading to obscurity in the law.[201]

Circuits are split on whether or not they consider ability to pay in their excessive fines analysis. The Eleventh Circuit, for example, expressly declines to consider the "characteristics of the offender" when determining whether or not a fine is excessive.[202] Instead, the Eleventh Circuit focuses its attention on the relationship of the fine to the character of the offense itself.[203] The First Circuit, in contrast, expressly considers a defendant's financial characteristics.[204] Other circuits are mixed in what factors they consider, and the extent to which they will consider a defendant's ability to pay.[205]

Although the Supreme Court did not discuss specifically whether an individual's ability to pay is relevant for the Excessive Fines Clause,[206] the reasoning incorporating the Eighth Amendment to the states suggests that "ability to pay" is relevant to excessiveness determinations.[207] The Court referenced history

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modern touchstone for evaluating claims that wealth-based barriers to litigation access . . . violate the principle of equal justice." Fisher, *supra* note 96, at 113. *Bearden* should be applicable to the consequences of failing to pay fines and fees, but currently the doctrine "authorizes criminal justice user fees, as long as certain procedures are in place to protect indigent defendants." *Id.* at 119. While the *Bearden* line of cases is beyond the scope of this Note, its shortcomings allow for the wealth-based civil punishments that this Note seeks to eradicate.

201. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834 (2013).

202. Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 87 (2020) (quoting United States v. 817 Ne. 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999)). *See also* Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000) (quoting Joyce v. City and County of San Francisco (N.D. Cal. 1994)) (finding that homelessness is "not a status," and that punishment of camping permissibly targets conduct). The *Joel* decision is troubling, as the Supreme Court held in *Bearden* that judges must "conduct a meaningful inquir[y] into the reasons for failure to pay before jailing a person for nonpayment" (internal quotation marks omitted). *ACLU Statement for the U.S. Commission on Civil Rights Hearing on "Municipal Policing and Courts: A Search for Justice or a Quest for Revenue,"* ACLU (Mar. 18, 2016), https://www.aclu.org/hearing-statement/aclu-statement-us-commission-civil-rights-hearing-municipal-policing-and-courts [https://perma.cc/AK9M-7E9B].

203. *See* McLean, supra note 201, at 846.

204. *See* Harawa, *supra* note 202, at 87; United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007).

205. *See* Harawa, *supra* note 202, at 87; United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (considering other penalties authorized by the legislature); United States v. Sperrazza, 804 F.3d 1113, 1127 (11th Cir. 2015) (considering, in part, penalties authorized by the legislature and the harm caused by the defendant).

206. *See* Harawa, *supra* note 202, at 93. The Court in *Timbs* did not discuss ability to pay even though the issue had been submitted before them. *Id.*

207. *Id.* at 94.

dating back to the Magna Carta, and observed that economic sanctions at the time had to be proportionate to the wrong and "not be so large as to deprive [an offender] of his livelihood."[208] In the majority opinion, Justice Ginsburg continued by describing the protection against excessive fines as "a constant shield throughout Anglo-American history" and "fundamental."[209] By tying in the original proportionality requirement for an excessive fine and making the clause's history and foundations key for its incorporation, the Supreme Court could be showing an inclination towards an ability-to-pay inquiry as a component of the Excessive Fines Clause.[210]

As a policy matter, an ability-to-pay analysis is advantageous to unhoused litigants invoking the Excessive Fines Clause. People experiencing homelessness often lack the ability and resources to meet even their most basic needs, such as rest and shelter.[211] In addition, civil fines on unhoused persons further exacerbate the cycle of poverty.[212] If courts require an individualized inquiry into the socioeconomic status of the offender, an unhoused person's socioeconomic status would help remove them from risk of fines that may not be large in monetary value, but that they are unable to pay. In *Timbs*, the Supreme Court did not go beyond incorporating the Excessive Fines Clause to the states through the Fourteenth Amendment and remanding Timbs' case to the Indiana Supreme Court.[213] On remand, the Indiana Supreme Court stated that it was critical to consider a punishment's magnitude on an individual for the purposes of the clause, giving further weight to the idea that an individual's circumstances are important for determining the excessiveness (or lack thereof) of a fine.[214]

IV. THE EXCESSIVE FINES CLAUSE'S APPLICATION TO CIVIL PUNISHMENT OF UNHOUSED PERSONS

This Part demonstrates that the Excessive Fines Clause covers civil forfeiture and monetary fines. Part IV.A discusses civil

208. Timbs v. Indiana, 139 S. Ct. 682, 688 (2019) (quoting Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)).
209. *Id.* at 689 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).
210. *See* Harawa, *supra* note 202, at 90.
211. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 11.
212. *Id.* at 15.
213. *See* Harawa, *supra* note 202, at 90.
214. *See* Colgan & McLean, *supra* note 16, at 432.

forfeitures, while Part IV.B discusses monetary fines. Part IV.C concludes that *Austin* and *Timbs* show that the Excessive Fines Clause provides protections against excessive, partially punitive civil punishment.[215]

A. CIVIL FORFEITURES FOR PEOPLE EXPERIENCING HOMELESSNESS

Civil fines for people experiencing homelessness often come in the form of civil forfeitures, and courts should consider those forfeitures as fines when deciding cases under the Excessive Fines Clause. The Supreme Court has indicated that civil forfeitures fall within the Clause.[216] Civil forfeitures include forfeiting nearly any kind of property for its alleged involvement in a crime.[217] In the case of *Timbs v. Indiana*, for example, the state seized Timbs' car, alleging that he had used his car to transport heroin.[218]

When the state seizes an unhoused person's property, the value of the property itself may not be high,[219] such as the seizure of tents, blankets, bedding, and other personal property.[220] Because courts have already placed a special emphasis on items such as homes and cars because they are necessary for a person to live, they could extend this logic to other life-saving items that people may need to survive outside.[221] Because courts have previously considered the intangible, subjective value of a property,[222] they could extend this logic to aid people experiencing homelessness. Through this extension, courts could block law enforcement officials from discarding blankets and personal property[223] on the

215. *See* Colgan, *supra* note 42, at 18.
216. *Id.* at 10.
217. *Types of Federal Forfeiture*, *supra* note 143.
218. Timbs v. Indiana, 139 S. Ct. 682, 684 (2019).
219. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 58 (describing the city of Sacramento's practice of seizing unhoused people's "personal property"); Jenna Chandler, CURBED, *Homeless Advocates Challenge Constitutionality of Sweeps, Seizures* (Jul. 19, 2019), https://la.curbed.com/2019/7/18/20699345/homeless-camps-seizures-law-suit-constitutional [https://perma.cc/L33G-PF3R] (describing seizure of bike repair tools, a vacuum, cleaning supplies, and a tent).
220. Laura Smith, *Denver Isn't the Only City Seizing Homeless People's Gear*, MOTHER JONES (Dec. 16, 2016), https://www.motherjones.com/politics/2016/12/denver-homeless-survival-gear-seizures/ [on file with Columbia Journal of Law and Social Problems].
221. *See, e.g.*, Von Hofe v. United States, 492 F.3d 175, 188 (2d Cir. 2007).
222. State v. 633 East 640 North, 994 P.2d 1254, 1260 (Utah 2000).
223. Smith, *supra* note 220.

theory that the subjective value of that property is too high compared to the "crime" of sleeping outside.

B. MONETARY FINES FOR PEOPLE EXPERIENCING HOMELESSNESS

The Excessive Fines Clause also covers small monetary fines placed upon people experiencing homelessness for activities such as sleeping outside, using a tent, or begging. First, civil fines can lead to criminal punishment, and as such should be subject to close judicial scrutiny.[224] Civil fines can collaterally lead to imprisonment through punishments for failure to pay,[225] but are not afforded the same resources or protections as criminal punishment.[226]

Even when fines do not lead to imprisonment, consequences can be dire. It is estimated that tens of millions of poor people are in debt.[227] Differently situated people experience the same punishments differently.[228] A small fine may seem insignificant to many, but could be insurmountable for an unhoused person.[229] For an unhoused person, fines can make it difficult if not impossible to find employment, transportation, or be eligible for housing in the future.[230]

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224. *See* Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1500 (2020) (Recent research has catalogued the numerous recurring procedural failures that have contributed to the continued prevalence of "modern-day debtors' prisons" despite the protections laid out in *Bearden*."). Although this Note does not cover the scope of criminal punishment, criminal punishment does lead to heightened constitutional protections, but only once judicial proceedings have been initiated, and not for all criminal proceedings. *See generally Right to Counsel*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/right_to_counsel [https://perma.cc/JVD4-H8MR].

225. *See, e.g.*, 18 U.S.C. § 3614 (allowing for imprisonment if a defendant "willfully refused" to pay a fine or "failed to make sufficient bona fide efforts" to pay a fine).

226. *See* Rankin, *supra* note 49, at 381 ("But to the extent . . . constitutional protections apply to criminalization, they mostly apply to criminal charges, hardly to civil enforcement, and not at all to invisible persecution.").

227. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1786 (2010) ("Because monetary sanctions are increasingly employed, and because the number of people convicted of criminal offenses in the United States has reached a record high, we can infer that the number of people who possess legal debt is significant and rapidly increasing.").

228. *See* Rankin, *supra* note 49, at 397.

229. *See generally* Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE LJ. 1473 (2020) (discussing "poverty criminalization" and its impact on poor communities).

230. *See* Colgan, *supra* note 42, at 64–65.

These fines can lead to imprisonment.[231] Even though the Court has ostensibly held debtors' prisons as unconstitutional,[232] if a person is unable to pay their fine or fee, they may be reincarcerated for their failure to pay and then charged by the jail for the cost of their incarceration.[233] Debt can also be used to increase criminal sentences.[234] Ironically, legal debt can force people to turn to illegal means to avoid more debt and higher sentences in the future.[235]

The average fine for a person experiencing homelessness is $150.[236] Approximately 10 percent of unhoused people actually pay these fines.[237] A smaller percentage will attempt to complete community service in order to pay fines, but approximately 60 percent of unhoused people do nothing about their legal debt.[238] So, not only do these fines increase recidivism,[239] worsen future opportunities for people experiencing homelessness,[240] and severely damage the mental health of unhoused people,[241] but they may fail to even raise revenues for municipalities.[242]

C. A POTENTIAL FRAMEWORK FOR THE USE OF THE EXCESSIVE FINES CLAUSE TO UNHOUSED PERSONS

This Part offers a proposed framework to apply the Excessive Fines Clause to people experiencing homelessness. Courts should emphasize proportionality and ability to pay and concludes that

231. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1761 (2010) ("Although some researchers claim, perhaps rightly, that it is unconstitutional to imprison offenders for nonpayment of debt . . . ., this does not mean that it does not occur, as the U.S. Supreme Court has ruled that debtors may be incarcerated for "willful" nonpayment of legal debt" (internal quotations omitted)).

232. *See* Bearden v. Georgia, 461 U.S. 660, 664 (1983) ("A sentencing court cannot properly revoke a defendant's probation for failure to pay a fine and make restitution, absent evidence and findings that he was somehow responsible for the failure.").

233. *See* Harris et al., *supra* note 227, at 1783–84.

234. *Id.* at 1784.

235. *Id.* at 1785.

236. Herring, *supra* note 58, at 12.

237. *Id.*

238. *Id.*

239. *See* Harris et al., *supra* note 227, at 1785.

240. *See* Colgan, *supra* note 42, at 65.

241. *See* Herring, *supra* note 58, at 10.

242. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 44 ("An analysis of thousands of vehicle tows and lien sales in multiple California cities suggests that this practice costs more than cities recoup in tickets or revenue flowing from sales of impounded vehicles.").

the Excessive Fines Clause is a viable path forward for unhoused persons.

When applying the Excessive Fines Clause to unhoused persons, courts should focus on proportionality. With the incorporation of the Excessive Fines Clause, many courts will be deciding for the first time what fines and fees fall under the Clause and whether or not they are "excessive."[243] Professor Beth Colgan, one of the country's leading experts on economic sanctions as punishment and the Excessive Fines Clause,[244] advocates for a multifactored approach when addressing financial hardship for proportionality under this clause.[245] Under her approach, courts would look to employment and educational access, meeting basic human needs, family and social stability, and satisfying legal obligations.[246] For people experiencing homelessness, the inquiry under this framework would be relatively simple and effective—as discussed in Part II *supra*, these fines are unimaginably disruptive for people experiencing homelessness, and unhoused persons are more often than not unable to pay them.[247]

The issues people experiencing homelessness face with fines calls into question whether any fine for life-sustaining activities is constitutional. The wealth of the offender is the key factor for the deterrent effect of a fine, not the amount of the fine.[248] Even when using the Excessive Fines Clause, a small, "constitutional" fine can still be life-altering for people experiencing homelessness. If courts hold large fines to be constitutional, despite their potential for massive individualized harm, the Excessive Fines Clause risks losing its original meaning and its protections.[249] Because the Excessive Fines Clause is meant to protect individuals, courts should not presume that fines are constitutional if they are within

243. *See generally* Harawa, *supra* note 202, at 87 (creating a roadmap for courts to apply the Excessive Fines Clause).

244. *Beth A. Colgan*, UCLA LAW, https://law.ucla.edu/faculty/faculty-profiles/beth-a-colgan [perma.cc/B9S2-QK5S].

245. Colgan & McLean, *supra* note 16.

246. *Id.*

247. *See supra* Part IV.B.

248. *See* John Bronsteen et al., *Retribution and the Experience of Punishment*, 98 CAL. L. REV. 1463, 1465–75 (2010). In this article, the authors argue that smaller or larger fines do not substantially impact the negative experience of punishment—instead, the wealth of the offender in relation to the fine determines the impact of the punishment. *Id.* The authors conclude that this fact should lead retributivist scholars to reexamine proportionality between crime and punishment. *Id.*

249. *See* Colgan & McLean, *supra* note 16.

legislative guidelines, as they have done in the past.[250] Courts should instead consider whether *any* fine criminalizing homelessness through criminalizing activities such as sleeping, lying down, or begging is "excessive," and should use individualized determinations when deciding the excessiveness of a fine.

The Excessive Fines Clause is meant to be a "constant shield" against "exorbitant tolls."[251] To be an effective shield, courts must take individualized circumstances into account.[252] While individualized determinations may pose a resource challenge for courts, they are necessary to ensure the effectiveness of the Clause. Holistic frameworks, such as the one laid out by Professor Colgan, can provide a way for courts to efficiently assess individualized circumstances. In the case of unhoused persons, individualized determinations should be more straightforward—the criminalized conduct is often minor, including activities such as sleeping, and the individual's ability to pay is low.[253] Individualized determinations for fines criminalizing homelessness may even show that these fines are always constitutionally excessive.[254]

The question of whether any fine criminalizing homelessness is constitutionally valid shows a need for courts and legislatures to explore other solutions for homelessness. Homelessness is a public health crisis,[255] and there are many reasons not to want people living on the street.[256] But criminalization through quality of life ordinances and laws does not work for combating homelessness.[257] As Magistrate Judge Clarke explained in *Blake v. City of Grants Pass*,

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250. *See, e.g.*, United States v. Seher, 562 F.3d 1344, 1371 (11th Cir. 2009) (assuming the constitutionality of a fine as long as it is within legislative guidelines).

251. Colgan & McLean, *supra* note 16, at 433.

252. McLean, *supra* note 201, at 901 ("[P]rotection of a minimum core level of economic viability for persons against whom penalties are assessed, determined with some reference to the individual's personal economic circumstances . . . were unquestionably recognized as fundamental rights at common law."). The application of an individualized Excessive Fines inquiry is beyond the scope of this Note.

253. *See supra* Part III.C.

254. It follows that if the offender's ability to pay and the offense are both relevant in determining a fine's excessiveness, fines that criminalize the conduct of poor people living outside may always be excessive. *Id.*

255. *See* GIBSON DUNN, *supra* note 31, at 7.

256. *See Litigation Update:* City of Boise v. Martin, FEDERALIST SOC'Y, https://fedsoc.org/events/litigation-update-city-of-boise-v-martin [https://perma.cc/Y6S4-FUZ4] (describing how people experiencing homelessness in homeless encampments are exposed to "crime, disease, intimidation, all sorts of other problems" when living on the street).

257. *See supra* Part III.C.

> Quality of life laws erode the little trust that remains between homeless individuals and law enforcement officials. This erosion of trust . . . increases the risk of confrontations between law enforcement and homeless individuals, . . . [and] makes it less likely that homeless individuals will cooperate with law enforcement. Moreover, quality of life laws, even civil citations, contribute to a cycle of incarceration and recidivism. Indeed, civil citations requiring appearance in court can lead to warrants for failure to appear . . . [and] unpaid civil citations can impact a person's credit history and be a direct bar to housing access in competitive rental markets . . . . In this way, civil penalties can prevent homeless people from accessing the very housing that they need to move from outdoor public spaces to indoor private ones.[258]

Prohibiting the imposition of civil fines on people experiencing homelessness is unlikely to worsen rates of homelessness, because these fines cause and exacerbate homelessness.[259] These fines also cause recidivism[260] and mental health problems for people experiencing homelessness.[261] By declaring that Constitution will not support fines that serve to criminalize homelessness, courts can push legislatures to think of empathetic solutions rather than "solutions" that amount to little more than a band-aid on a systemic problem.[262]

The Excessive Fines Clause can provide an Eighth Amendment tool that helps protect against civil punishment and factors in the proportionality of a punishment to the offense and the offender. This framework can work in conjunction with other constitutional protections that go beyond the scope of this note, such as using the First Amendment to protect against the criminalization of begging

258. Blake v. City of Grants Pass, 2020 WL 4209227, at *17 (D. Or. July 22, 2020) (footnotes omitted).

259. *Cf.* Herring, *supra* note 58, at 12 (describing increased violence due to enforcement of anti-homeless laws).

260. *See* Harris et al., *supra* note 227, at 1783–84.

261. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 15.

262. *See Blake*, 2020 WL 4209227, at *17; *see generally* Herring, *supra* note 58 (describing how the criminalization of homelessness perpetuates homelessness in the United States).

and the Fourth Amendment to protect against unconstitutional seizures.[263]

While the Excessive Fines Clause is a promising path forward for unhoused litigants, success is far from guaranteed. For example, in civil forfeiture cases, owners of property are not appointed a lawyer, and it would often be economically unfeasible for these property owners to afford representation.[264] This means that the Clause's protections may be a "back-end solution" that only provides protection if people experiencing homelessness fight back in court.[265] But, while a back-end solution is not a permanent solution towards ending the criminalization of homelessness, it could be effective as another tool to chip away at laws criminalizing homelessness.

Chipping away at laws criminalizing homelessness could be effective, as this sort of gradual approach has worked before. Lawyers and advocates spent twenty years chipping away at the vagrancy law regime in the United States from the 1950s through the 1970s.[266] Before the 1960s, people arrested for vagrancy laws had little to no chance at getting a lawyer and little to no chance at success in the courts.[267] But once lawyers started taking on these cases, the resulting litigation thrust vagrancy laws and the problems with them into the public sphere.[268] Once vagrancy laws were publicly attacked, advocates had more success in striking them down, culminating in *Papachristou v. City of Jacksonville*, which struck down ordinances criminalizing loitering and vagrancy.[269]

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263. *See generally* Rankin, *supra* note 13 (discussing Fourth Amendment protections against seizures of tents and blankets); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 81 (describing how the First Amendment right to expressive conduct may be used to protect people experiencing homelessness); *see also* Paul Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989) (discussing prohibitions against sleeping outside as unconstitutional under the Due Process Clause of the Fourteenth Amendment).

264. *See* Emma Andersson, *The Supreme Court Didn't Put the Nail in Civil Asset Forfeiture's Coffin*, ACLU BLOG (Mar. 15, 2019), https://www.aclu.org/blog/criminal-law-reform/reforming-police/supreme-court-didnt-put-nail-civil-asset-forfeitures [https://perma.cc/47BH-J9RH].

265. *Id.*

266. *See generally* GOLUBOFF, *supra* note 44 (describing how vagrancy laws were deemed unconstitutional through repeated litigation across various frameworks).

267. *Id.* at 5.

268. *Id.* at 6.

269. *Id.*; Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972).

The same approach could work for laws criminalizing homelessness.[270] By incorporating the Excessive Fines Clause as a tool for unhoused litigants, people experiencing homelessness could escape the pitfalls of the *Robinson* doctrine and find relief against monetary fines and civil forfeiture. This approach would allow courts to assist in ending criminalization of homelessness without calling on them to run municipal governments. Even if the Excessive Fines Clause argument is not always successful in courts, elevating the constitutional arguments could push criminalization of homelessness into the public conversation and motivate legislatures to come up with creative solutions for solving homelessness—ones that do not focus on crude additions to the criminal code.[271]

CONCLUSION

The end goal of advocacy for people experiencing homelessness should not be the right to live on the street.[272] Instead, advocacy for people experiencing homelessness should focus on building a future where people are guaranteed access to housing and basic needs.[273] By moving the Eighth Amendment focus for people experiencing homelessness away from the *Robinson* doctrine and towards the Excessive Fines Clause, this Note contends that advocates for unhoused persons should focus on decriminalizing

270. The Excessive Fines Clause would be a tool for unhoused litigants. For examples of other legal victories for unhoused persons, see, e.g., *Coalition for the Homeless Legal Victories*, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/other-coalition-for-the-homeless-legal-victories/ [https://perma.cc/3UE4-MT2C] (describing how the Coalition for the Homeless has used litigation to protect the rights of people experiencing homelessness throughout the last three decades). Their work has involved class action lawsuits demanding medically appropriate housing for unhoused persons in New York City who are seropositive for HIV, ensuring that people with disabilities are able to meaningfully access Department of Homeless Services (DHS) shelters, and successfully seeking education and job training for unhoused people under the age of 21. *Id.*

271. *Martin* itself led to a $1,335,000 settlement, and the city of Boise has committed to spend at least one-third of the settlement on rehabilitating people experiencing homelessness and creating additional overnight shelter space. *Settlement Reached in Groundbreaking* Martin v. City of Boise *Case*, CITY OF BOISE (Feb. 8, 2021), https://www.cityofboise.org/news/mayor/2021/february/settlement-reached-in-groundbreaking-martin-v-boise-case/ [https://perma.cc/A4QR-333X]; *see also* Blake v. City of Grants Pass, 2020 WL 4209227, at *17 (D. Or. July 22, 2020) (proposing that the legislature come up with creative solutions for solving homelessness in Grants Pass).

272. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 10.

273. *Id.*

behavior beyond status crimes and a person's right to live on the street.

With its 2019 incorporation, state courts may be applying the Eighth Amendment's Excessive Fines Clause for the first time. When applying the Clause to unhoused persons, courts should consider the proportionality between the offense and the offender, the individual's ability to pay, and should consider property seizures as fines. By doing this thorough analysis, courts can faithfully apply the original meaning of the Clause—as a protection against disproportionate punishment. The Eighth Amendment's Excessive Fines Clause presents a promising strategy moving forward for advocates for people experiencing homelessness.

Applicant Details

First Name	**Bridget**
Last Name	**Ansel**
Citizenship Status	**U. S. Citizen**
Email Address	**bka253@nyu.edu**
Address	**Address** **Street** **503 6th Avenue Apt. 2** **City** **Brooklyn** **State/Territory** **New York** **Zip** **11215** **Country** **United States**
Contact Phone Number	**3124934582**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2013**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Tax Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Berke, Barry
BBerke@KRAMERLEVIN.com
212-715-7560
Law, Kerri Ann
KLaw@kramerlevin.com
Martinez, Michael
MMartinez@KRAMERLEVIN.com
212-715-9404
Estlund, Cynthia
cynthia.estlund@nyu.edu
212-998-6184

This applicant has certified that all data entered in this profile and any application documents are true and correct.

BRIDGET ANSEL

503 6th Ave Apt. 2 | Brooklyn, NY 11215
(312) 493-4582 | bka253@nyu.edu

June 17, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East
Room S905
Brooklyn, NY 11201

Re: Clerkship Application

Dear Judge Matsumoto,

I am writing to apply for a clerkship in your chambers for the 2025-2026 term. I received my J.D. from New York University School of Law in 2021, and I am currently a litigation associate at Kramer Levin Naftalis & Frankel LLP ("Kramer Levin") in New York City.

Please find attached: my resume, law school transcript, and writing sample, which is an excerpt of the Directed Research project I undertook during my 3L year of law school. Additionally, my application includes recommendations from the following individuals:

- **Barry Berke**: Partner, Kramer Levin (212-715-7560)
- **Kerri Ann Law**: Partner, Kramer Levin (212-715-9128)
- **Michael Martinez**: Partner, Kramer Levin (212-715-9404)
- **Cynthia Estlund**: Professor, New York University School of Law (212-998-6184)

During my time at Kramer Levin, I have worked directly with the three partners listed above. While in law school, I took a seminar with Professor Estlund and served as her research assistant; Professor Estlund also supervised my Directed Research project during my 3L year of law school.

Please reach out to me if you have any questions. I look forward to hearing from you.

Respectfully,

/s/ Bridget Ansel
Bridget Ansel

BRIDGET ANSEL

503 6th Ave Apt. 2 | Brooklyn, NY 11215
(312) 493-4582 | bka253@nyu.edu
Admitted to the New York State Bar

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., May 2021
Activities: Tax Law Review (*Senior Staff Editor*); NYU Tax Law Society (*Events Chair*); U.S. Attorney's Office – Eastern District of New York (*Externship*); Research Assistant (*Professor Cynthia Estlund*)

GEORGETOWN UNIVERSITY, Washington, D.C.
B.A. in History and Government, *cum laude*, May 2013
Honors: Distinction in History Major
Honors Thesis: *From "Money Power" to "Slave Power": The Threat to Senator Thomas Hart Benton's Jeffersonian Vision*

EXPERIENCE

KRAMER LEVIN NAFTALIS & FRANKEL LLP, New York, NY
Associate, October 2021 – Present; ***Summer Associate***, Summer 2020
Actively working on a white-collar criminal investigation and two high-profile trial matters; responsibilities include: preparing extensive case chronology, drafting fact outlines, conducting discovery, and interviewing the client. Conducted legal research and assisted with drafting multiple civil motions and briefs. Successfully represented two *pro bono* asylum clients; researched and drafted asylum brief; prepared client for trial testimony; conducted direct examination in Federal Immigration Court.

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL, TAXPAYER PROTECTION BUREAU, New York, NY
Legal Intern, Summer 2019
Drafted memos analyzing legal issues arising under the New York False Claims Act. Assisted with investigations of alleged fraud committed against New York State and local governments. Advised the Assistant Attorneys General on various legal matters including the Bureau's discovery obligations and law concerning sales tax burdens. Attended proffer sessions and meetings with relator's counsel.

WASHINGTON CENTER FOR EQUITABLE GROWTH, Washington, D.C.
Policy Analyst, December 2016 – June 2018; ***Writer/Editor***, December 2015 – November 2016
Developed and ran the organization's Family Economic Security portfolio, which focused on labor policy, pay inequality, wages, paid family leave, and social insurance. Wrote economic blogs, reports, and op-eds, which were published on the organization's website and by mainstream media outlets, including *Politico*, *The Guardian*, and *Newsweek*. Organized and chaired policy meetings and events with public and private sector stakeholders. Drafted all funding and grant applications in 2016, raising a total of $3 million that year.

CENTER FOR AMERICAN PROGRESS *(Washington Center for Equitable Growth)*, Washington, D.C.
Assistant Editor, Publications and Development, September 2014 – December 2015; ***Special Assistant***, October 2013 – August 2014
Wrote and edited all funding documents and grant proposals. Prepared original content for the organization's website and blog. Assisted Executive Director, Heather Boushey, with, among other things, speechwriting and research.

ADDITIONAL INFORMATION

Eight-time marathon runner. Certified yoga instructor. Chicago Cubs enthusiast.

Name: **Bridget K Ansel**
Print Date: **06/07/2023**
Student ID: **N14147979**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/19/2021
School of Law
Major: Law

Fall 2018

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Torts	LAW-LW 11275	4.0	B
Instructor: Catherine M Sharkey			
Procedure	LAW-LW 11650	5.0	B
Instructor: Troy A McKenzie			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: New York City Politics			
Instructor: Katrina M Wyman			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Income Taxation	LAW-LW 10694	4.0	B+
Instructor: Mitchell A Kane			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	B
Instructor: Erin Murphy			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: New York City Politics			
Instructor: Katrina M Wyman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	B+
Instructor: Marcel Kahan			
Evidence	LAW-LW 11607	4.0	B+
Instructor: Erin Murphy			
Regulating Work Beyond Employment Seminar	LAW-LW 12513	1.0	A-
Instructor: Cynthia L Estlund Wilma Beth Liebman			
Policy Analysis	LAW-LW 12695	4.0	CR
Instructor: Ryan J Bubb David Carl Kamin			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Prosecution Externship - Eastern District	LAW-LW 10103	3.0	CR
Instructor: Jacquelyn M Kasulis Alixandra Smith			
Prosecution Externship - Eastern District Seminar	LAW-LW 10355	2.0	CR
Instructor: Jacquelyn M Kasulis Alixandra Smith			
Sports Law	LAW-LW 10585	3.0	CR
Instructor: Jodi Saposnick Balsam Arthur R Miller			
Constitutional Law	LAW-LW 11702	4.0	CR
Instructor: Melissa E Murray			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	56.0	56.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B
Instructor: Stephen J Schulhofer			
Directed Research Option A	LAW-LW 10737	2.0	A
Instructor: Cynthia L Estlund			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: William E Nelson			
Property	LAW-LW 11783	4.0	A
Instructor: William E Nelson			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Cynthia L Estlund			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	70.0	70.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Free Speech	LAW-LW 10668	3.0	A-
Instructor: Amy M Adler			
Legislation and Political Theory	LAW-LW 11688	3.0	A
Instructor: John A Ferejohn			
Federal Courts and the Federal System	LAW-LW 11722	4.0	CR
Instructor: Helen Hershkoff			
Urban Environmental Law and Policy Seminar	LAW-LW 12603	2.0	A
Instructor: Danielle H Spiegel Katrina M Wyman			
Tax Law Review	LAW-LW 12743	1.0	CR
Instructor: Mitchell A Kane			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	83.0	83.0

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

The following guidelines represent NYU School of Law's guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	**A** = 7-13%	**A-** = 16-24%
B+ = 22-30%	**B** = Remainder	**B-** = 0-8% (First-Year JD); 4-11% (All other JD and LLM)
C/D/F = 0-5%	**CR** = Credit	**IP** = In Progress
EXC = Excused	**FAB** = Fail/Absence	**FX** = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2022 AND EARLIER & LLM STUDENTS

semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 9/14/2020

Kramer Levin

Barry H. Berke
Partner
T 212.715.7560
F 212.715.7660
bberke@kramerlevin.com

1177 Avenue of the Americas
New York, NY 10036
T 212.715.9100
F 212.715.8000

June 14, 2023

Re: Bridget Ansel

Dear Your Honor:

I am the chair of the litigation department at Kramer Levin. It is with great pleasure that I write in support of Bridget Ansel's clerkship application.

Bridget is an outstanding lawyer with whom I have worked closely since she joined Kramer Levin. She has already distinguished herself as one of the brightest and ablest associates in her associate class. Her analytical and writing skills, her problem-solving abilities, and her judgment are of the highest caliber. Bridget combines these talents with first-rate organizational and case-management skills and produces polished work product in an extremely efficient manner. She is someone that we find invaluable to have on our team for cases large and small.

Since joining the firm, Bridget has worked on a variety of significant and challenging matters and always performed at an extraordinarily high level. She has worked closely with me in our defense of the former lieutenant governor of New York in a criminal case that we had been preparing for trial when the bribery charges were dismissed. She is currently working with me on another criminal case that involves complex financial issues and is scheduled to go to trial early next year. In both matters, Bridget has played an extremely important role in helping us prepare for trial. Bridget has contributed significantly to legal and factual research and writing, trial preparation, evidentiary analysis, and client and witness interviews. Bridget has done a tremendous job mastering the complicated subjects, identifying what mattered among the millions of documents, and distilling the nuances of the complex issues involved in the cases.

Finally, on a personal level, Bridget is a terrific colleague. She has a great attitude, a deep commitment to the cases she works on, a warm and engaging manner when dealing with clients, colleagues, and adversaries. She juggles all of her responsibilities with tremendous professionalism.

June 14, 2023

For all these reasons, I wholeheartedly recommend Bridget for a position as a law clerk in your chambers. If you have any questions or need any further information, please do not hesitate to contact me.

Very truly yours,

Barry H. Berke

Kramer Levin

Kerri Ann Law
Partner
T 212.715.9128
F 212.715.8128
klaw@kramerlevin.com

1177 Avenue of the Americas
New York, NY 10036
T 212.715.9100
F 212.715.8000

June 20, 2023

Re: Bridget Ansel's Clerkship Application

Dear Your Honor:

With great enthusiasm, I write to recommend Bridget Ansel as a law clerk. As one of her supervising attorneys at Kramer Levin on two separate occasions – once while she was a summer associate and then again after she returned as a full-time litigation associate – I have had ample opportunity to evaluate Bridget's work and abilities. As a former federal law clerk, I can attest without reservation that Bridget will be an outstanding law clerk and an asset to Chambers. Bridget is smart, attentive, proactive, diligent and a great team player.

Bridget's experience at Kramer Levin has been very diversified, both in terms of subject matter and tasks. She has worked on varied white collar and commercial litigation matters, including securities class actions, real estate litigation and high-profile criminal matters. She has conducted legal research, prepared written legal analyses, drafted fact chronologies, performed document review, and interacted with adversaries and clients. She adapts well to all circumstances, and her ability to work on any substantive matter will serve her well as a law clerk.

Bridget's research is first rate. She has researched several complicated areas of the law for several of my matters. She is efficient, thorough and understands the importance of applying the law to the facts at hand. She quickly understands difficult nuisances in the law. Her written analysis is clear and concise.

Bridget's presentation skills are equally excellent. Bridget intelligently presents issues in a logical manner, and she is confident in the opinions she has formed as a result of her research or factual analysis. Bridget also has excellent judgment and contributes in every situation.

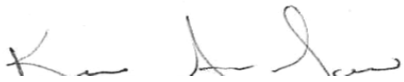
Bridget also has been actively involved in the firm's pro bono work. For example, she has worked to obtain disability benefits for a Marine Corps veteran, has sought asylum for an Afghan Air Force pilot and a Tibetan monk, has helped women in troubled situations obtain divorces, and represented a religious organization facing eviction from property it occupied for over a century. In each situation, she received high praise from her supervising attorneys, all of whom noted her poise and dedication in often difficult circumstances.

In addition to her technical legal abilities, Bridget has great maturity and judgment and a down-to-earth personality. Her experience at a law firm provides real world experience that will make

her a very valuable clerk. And as an eight-time marathon runner, there is no doubt Bridget is hard-working, focused, motivated and resilient.

In short, I enthusiastically recommend that you consider Bridget's candidacy. Please let me know if I can provide any further information.

Respectfully,



Kerri Ann Law

Kramer Levin

Michael Martinez
Partner
T 212.715.9404
F 212.715.8404
mmartinez@kramerlevin.com

1177 Avenue of the Americas
New York, NY 10036
T 212.715.9100
F 212.715.8000

June 13, 2023

Re: **Bridget Ansel**

Dear Judge:

It is with great enthusiasm that I write this letter in support of Bridget Ansel's clerkship application. With her personal, academic, and professional qualities, I have no doubt that she would make an excellent law clerk.

I first started working with Bridget in connection with a federal criminal investigation of our client and his religious-organization employer for potential forced labor and immigration offenses. Bridget's work on the case has been nothing short of outstanding. Her lawyering far surpasses her years of experience.

I was immediately impressed with Bridget's keen intellect, and her excellent research and writing skills. Her written assignments have required more than just legal analytical skill (which she has in abundance), but a sensitivity to balancing the superficial appeal of the government's case against the constitutionally protected religious liberties of our client and the religious organization to which he has devoted his life's work. Bridget has not only digested large volumes of documents and witness statements, but has distilled the relevant law and facts into persuasive arguments and a compelling narrative to put our client in the best position to defend himself against potential criminal charges.

Bridget's work ethic is also top notch. She organized the entire document review, coordinated with our e-discovery vendor and contract attorneys, drafted and implemented a document-review protocol, and responded to any questions from the contract-review team. She drafted summaries of hot documents, escalated key issues for my review, and updated members of the joint defense-group. She works independently and always completes her assignments on time.

Most important, Bridget has an upbeat personality and a positive attitude, and she injects a healthy dose of levity whenever necessary. Our client's case has had its fair share of unfortunate developments, but that has never deterred Bridget or dampened her genuine enthusiasm. No matter how stressful the situation, she approaches it with confidence-inspiring optimism.

In light of my experiences with Bridget, I am confident that she would be an asset to your staff. She is smart, mature, and insightful. She thinks clearly and writes well. Above all,

June 13, 2023

I am sure that you will enjoy working with her. If you would like to discuss Bridget's candidacy further, please do not hesitate to contact me.

Sincerely,

/s/ Michael Martinez
Michael Martinez

New York University
A private university in the public service

Professor Cynthia L. Estlund
Catherine A. Rein Professor of Law

40 Washington Square South
Vanderbilt Hall, Room 403B
New York, NY 10012-1099
Telephone: (212) 998-6184
Facsimile: (212) 995-4590
E-mail: cynthia.estlund@nyu.edu

June 12, 2023

Dear Judge:

I'm writing in strong support of my student Bridget Ansel, a 2021 graduate of the NYU School of Law, who is applying for a judicial clerkship beginning in 2024. At that point she will have completed three years as an associate at Kramer Levin Naftalis & Frankel, in which she has focused on white collar criminal litigation and investigation, as well as pro bono immigration work.

Bridget came to law school after several years as a policy analyst in two related and highly respected Washington, D.C., think tanks It took her a year or so to get her academic footing in the very different arena of legal analysis, but she plainly did so, and her grades steadily rose from that point on.

I first encountered Bridget in my seminar on Regulating Work Beyond Employment, where she brought both her legal and her policy skills to bear on, among other things, analyzing proposals for extending what are currently employment-based benefits to gig workers and other independent contractors. She was a lively participant in the seminar, and produced several short papers along with that longer paper on employment benefits that reflected serious engagement with the materials and strong skills of legal and policy analysis.

Based on that experience, I agreed to supervise her "A paper," which addressed the question of sex disparities in parental leave policies. Despite considerable progress in the extension of parental leave policies to new fathers, and despite legal prodding from the Pregnancy Discrimination Act and the Family and Medical Leave Act, she documented continuing disparities in the *amount* of leave time, and especially paid leave time, granted to new fathers versus new mothers. Part of that obviously reflects the physical ordeals of childbirth and recovery, but the extent of the disparities cannot be wholly explained on that basis; nor, as a result, can they be reconciled with the law's prohibition of discrimination because of sex in terms and conditions of employment. In her paper, Bridget showed effectively how those continuing disparities in parental leave policies both reflect and reinforce gendered historical

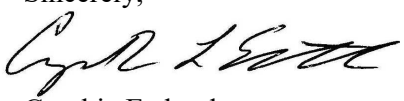
patterns and continuing stereotypes about the respective spheres of men and women in family and economic life.

This work of Bridget's made it clear to me that she would be an ideal research assistant for a portion of my book-to-be, *Automation Anxiety: Why and How to Save Work* (since published by Oxford University Press). One of the later chapters was about how to spread work by reducing hours—in particular, how to do given uncertainty about whether or not we are facing an overall reduction in demand for human labor. One seemingly obvious set of strategies consists of better accommodating those who *prefer* shorter hours in exchange for lower pay. That poses a challenge, however; given the still disparate preferences between men and women regarding work-family balance, policies that accommodate individual preferences risk entrenching and reinforcing the gendered stereotypes and social expectations that feed into those preferences. Related challenges lie in the economic and organizational forces that produce "long hours work cultures," which turn out to be a major impediment to women's progress in some fields, including law.

Bridget was already familiar, from her think-tank days, with some of the extensive research and experimentation across the world in how simultaneously to improve work-life balance, and work-family balance in particular, and to promote gender equality. She was able to marshall several fascinating streams of social science research on these questions, and to integrate that research with a deep understanding of relevant features of US law. Bridget educated me in the process and helped me to produce a much better chapter than I'd have been able to do otherwise.

Apart from her intellectual accomplishments and legal analytic skills, Bridget is a lovely person, both professional and congenial in her manner. I am grateful to have gotten to know her during law school, and I am confident that she will be a fine judicial clerk and an excellent citizen of the judicial chambers. Please do not hesitate to reach out if you have any questions.

Sincerely,



Cynthia Estlund

BRIDGET ANSEL

503 6th Ave Apt. 2 | Brooklyn, NY 11215
(312) 493-4582 | bka253@nyu.edu

WRITING SAMPLE

The attached writing sample is an excerpt from my law school Directed Research paper: *"Parallel Stereotypes": Title VII, Men's Right to Parental Leave and the Persistence of Separate Spheres.* It is entirely my own work; it has not been edited by others.

This paper addresses how employers that provide women with more parental leave than men may be in violation of Title VII and other anti-discrimination laws. The paper is structured as follows: First, I address the origins of modern workplace practices, and how they evolved in the context of a "separate spheres" ideology that cast the ideal woman as the caregiver and ideal man as a breadwinner. Second, I review the legal history of the "anti-stereotyping doctrine," and the ways in which courts have used this legal theory to interpret laws such as Title VII, the Pregnancy Disability Act ("PDA"), and the Family Medical Leave Act ("FMLA"). These laws not only helped integrate women into market work, but also lowered the barriers for men to engage in caregiving. Despite these advances, many men remain discouraged – in ways both implicit and explicit – from taking a meaningful parental leave after the arrival of a new child. Research finds that when paid leave is only allocated to women, she becomes the presumptive childcare expert, reinforcing the stereotype – both at work and at home – that women are de facto nurturers.

In the except that follows, I look at several paid leave policies common within large companies. I evaluate how antidiscrimination laws apply to potential claims that fathers may bring against their employers for unequal parental leave policies. For example, I argue that employers who allocate different leave periods depending on whether an employee is classified as a "primary" or "secondary" caregiver violates Title VII's prohibition on stereotyping to the extent these labels are assigned on the basis of gender or sex. Furthermore, employers who justify large differences in the amount of leave given to men versus women based on disability (due to pregnancy and physical recovery from childbirth) are not necessarily immune to legal challenges, particularly if the more generous leave period is also allocated to non-biological mothers (adoptive parents, for example).

III. Challenges to Employer Policies

Despite the advances of the anti-stereotyping doctrine, many employers still allocate paid leave differently depending on whether the employee is a man or woman. One obstacle is that, under the FMLA, employers are only required to provide workers with *unpaid* leave. While some states have begun implementing universal paid leave policies, there is no federal equivalent.[299] That means that workers who do have access to some sort of employer-sponsored paid leave – particularly fathers – are among the privileged, and may be hesitant to challenge what they view as a perk.[300] Furthermore, many Americans take for granted the fact that women are usually allocated more parental leave. There is also evidence that many men fear the professional consequences. [301] Such fears are warranted: Research shows that men who take leave experience a decline in their professional reputations and earning potential, in part because men are defying entrenched gender stereotypes. [302]

However, men's ability to play an equal role at home is fundamental to women's ability to gain equality at work. Providing paid leave to both men and women – assuming men use it equally - tends to reduce discrimination against women and increases the ability of every individual to make genuine choices, rather than yield to stereotype-driven conformance.[303] For example, when Quebec enacted a policy giving five weeks of paid leave to men, it had a "large and persistent impact on gender dynamics within households even years after the leave period ended," and resulted in a more equitable distribution of household labor, raising the likelihood that women were employed full time.[304]

Yet disparities are still baked into company policy. In analyzing a sample of 275 Russell 1000 companies, I found that 61 percent (168 companies) do not have parity between men and women in their paid leave programs, with an average difference of 8.6 weeks.[305] Of these companies, 74 percent have leave disparities in excess of six weeks,[306] 36 percent have disparities

[299] *State Paid Family Leave Laws Across the U.S.*, BIPARTISAN POL'Y CTR., https://bipartisanpolicy.org/explainer/state-paid-family-leave-laws-across-the-u-s/ (last visited May 1, 2021).
[300] *See* Lehnhart, *supra* note 8.
[301] ALBISTON, MOBILIZING THE FMLA, *supra* note 8, at 170.
[302] *See* Gretchen Gavett, *Brave Men Take Paternity Leave*, HARV. BUS. REV. (July 7, 2014), https://hbr.org/2014/07/brave-men-take-paternity-leave; Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femineity Stigma?*, 69 J. SOC. ISSUES 322 (2013); Scott Coltrane et al., *Fathers and the Flexibility Stigma*, 69 J. SOC. ISSUES 279 (2013).
[303] Ankita Patnaik, *Reserving Time for Daddy: The Consequences of Fathers' Quotas*, 37 J. LAB. ECON. 1009 (2019) (finding that Quebec's "use-it-or-lose-it" paternity leave policy increased men's involvement in domestic work and childcare and resulted in in women's increased investment in market work.); Maria C. Huerta et al., *Fathers' Leave and Fathers' Involvement: Evidence from Four OECD Countries*, 16 EUR. J. SOC. SEC. 308 (2014) (finding that fathers who take leave, especially those that take more than two weeks, have greater subsequent parental involvement with their child.); Ásdís A. Arnalds et al., *Equal Rights to Paid Parental Leave and Caring Fathers: The Case of Iceland*, 9 ICE. REV. PO. 323 (2013) (finding that after Iceland extended greater leave time to men, parents reported a more equal division of labor after having a child. The authors also found a direct correlation between the length of leave the father takes and his involvement in care later on in a child's life.).
[304] *Id.*
[305] JUST Capital, *supra* note 7.
[306] 45 percent of the entire sample.

in excess of eight weeks,[307] and 20 percent have disparities in excess of ten weeks.

Paid leave policies that facially discriminate between men and women almost certainly violate Title VII to the extent that leave is for caregiving purposes.[308] Today, however, explicit gender or sex classifications are uncommon. Most employers with unequal leave policies have found workarounds that, while maintaining differences in leave policy, do so using language that appears to be facially neutral with regard to gender and sex. Of course, women who give birth need time to physically recover in a way that their partner may not. Under the PDA, employers are allowed to provide preferential treatment for "pregnancy disability" (i.e. pregnancy and recovery from childbirth). However, if men and women are allocated different leave amounts, and the birth mother's leave exceeds the period of actual physical disability, it may violate Title VII's prohibition on gender classifications regardless.

In this section, I analyze how Title VII's anti-stereotyping doctrine would apply to three scenarios common to employer paid leave policies:

A. Policies that distinguish between (1) birth and adoptive leave (for birth mothers and adoptive parents) and (2) parental leave (for birth fathers, or the spouse/partner of the birth mother).
B. Policies that allocate leave based on whether one is a "primary" or "secondary" caregiver.
C. Policies that provide birth mothers with generous "disability" leave (beyond the period of actual physical disability), but provide no little to no leave for other parents.

Before turning to this analysis, however, it is important to understand how a Title VII challenge operates in practice. Courts analyze Title VII claims differently depending on the factual scenario. A disparate impact claim focuses on facially neutral employment practices that have an adverse effect on a protected group of workers.[309] Most sex-stereotyping claims under Title VII, however, are litigated under the disparate treatment theory of liability, in which courts may only grant relief when the plaintiff is able to demonstrate a discriminatory *intent*. [310] In some instances, plaintiffs provide direct evidence of discriminatory animus: an employer statement, for example, or policies that explicitly differentiate based on sex such as the policy in *Schaefer*.[311]

However, there is typically no "smoking gun" that links an employer's prejudice to an adverse action against their employee.[312] Thus, when a plaintiff relies on circumstantial evidence of discrimination, courts will apply the *McDonnell Douglas* burden-shifting framework. [313] Under

[307] 22 percent of the entire sample.
[308] *See supra* notes 259-268 and accompanying text.
[309] *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[310] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Tex. Dep't of City Affs. v. Burden*, 450 U.S. 248, 253-54 (1981).
[311] 903 F.2d at 243; *see also* Annie McClellan, *Direct Evidence or McDonnell Douglas: How Today's Paternity Leave Policies are Paving the Way for Title VII's Newest Wave of Direct Evidence Jurisprudence*, 86 U. CIN. L. REV. 1401, 1409-11 (2018).
[312] GEORGE A. RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW 62 (2017) (ebook).
[313] *McDonnell Douglas*, 411 U.S. at 802. Circuits take different approaches to the tests used for evaluating disparate treatment claims. For example, The Seventh Circuit has blurred the distinctions between direct and indirect evidence holding that at the summary judgement stage "Evidence is evidence. . . . In an employment discrimination case, the district courts must stop separating 'direct' from 'indirect evidence and proceeding as if they were subject to different legal standards . . . . Instead, all evidence belongs in a single pile and must be evaluated as a whole." *Ortiz*

McDonnell Douglas, the court first evaluates the *prima facie* case, in which the plaintiff must prove that: "(1) she is a member of a protected class; (2) she is qualified for the position; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of discrimination."[314] The burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the disparate treatment.[315] If the defendant meets this requirement, the plaintiff can still prevail by showing that the employer's action "was in fact pretext."[316]

The *McDonnell Douglas* framework is also used in mixed motive claims of disparate treatment, as discussed in the context of *Price Waterhouse*, in which both legitimate and illegitimate motivations play a role in employer decision making.[317] In *Price Waterhouse*, the court held that the plaintiff may prove a Title VII violation by showing that an employer based an adverse decision at least in part on discriminatory factors.[318] Once the plaintiff meets this burden, the employer must demonstrate that the legitimate factor, standing alone, would have induced the employer to make the same decision.[319]

If an employee is also covered by the FMLA, any paid leave they are eligible to take will run concurrently under the federal statute.[320] That means employers are also subject to the FMLA's anti-retaliation and anti-interference provisions.[321]

A. Biological Versus Adoptive Fathers

Some company policies, whether intentionally or not, allocate different amounts of leave to biological vs. adoptive fathers. For example, United Technologies Corporation ("UTC"), a multinational product manufacturer headquartered in Connecticut, provides eight weeks of "Birth and Adoption Leave" and four weeks of "Parental Leave."[322] In the company's guidebook, it states that while birth mothers, adoptive parents, and parents who receive a surrogate child are eligible for Birth and Adoption Leave, birth fathers are only eligible for the shorter parental leave.[323]

A plaintiff challenging a policy like that of UTC would likely offer the differentiation of leave allocation as direct evidence of discrimination against biological fathers. On its face, the fact that adoptive parents are eligible for eight weeks of leave negates any legitimate, nondiscriminatory reason, such as disability, that the employer could offer. However, an employer

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v. Werner Enterprises, Inc. 834 F. 3d 760, 765 (2016). *See also* Zachary J. Strongin, *Fleeing the Rat's Nest: Title VII Jurisprudence after Ortiz v. Werner Enterprises, Inc.*, 83 BROOKLYN L. REV. (2018) (note) (examining circuit differences in their analysis of *McDonnell Douglas* and Title VII claims, and discussing how *Ortiz* may affect their interpretation).

[314] *Weinstein v. Columbia Univ.*, 224 F.3d 33, 42 (2d Cir.2000) (citing *McDonnell Douglas*, 411 U.S. at 802).

[315] *McDonnell Douglas*, 411 U.S. at 802; *see also Tex. Dep't of City Affs*. 450 U.S. at 253-54.

[316] *McDonnell Douglas*, 411 U.S. at 804.

[317] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234-35 (1989).

[318] *Id*. at 244-45.

[319] *Id*. at 252.

[320] 29 CFR §825.207.

[321] *Id.*

[322] United Tech, *Your Guide to UTC Birth & Adoption Leave and Parental Leave* (Feb. 2016), http://ll743.org/html /FORMS/parental%20leave/Birth%20and%20Adoption%20Policy%20-%20EE.pdf. United Technologies merged with Raytheon Technologies in April 2020. I could not find an updated leave policy for the new company, and therefore this description may be out of date.

[323] *Id*.

could raise *Johnson v. University of Iowa.*[324] *Johnson* centered on the fact that women were allocated six weeks of parental leave, while biological fathers were allocated none. [325] However, the plaintiff raised the fact that adoptive parents were allocated five days of leave to argue that the policy discriminated against biological fathers in violation of both Title VII and the Equal Protection Clause. [326]

The *Johnson* court dismissed the plaintiff's arguments, stating the University's allocation of paid leave to adoptive parents, but not fathers, was rationally related to the adoptive parents' unique legal and financial burden.[327] The court also dismissed the plaintiff's Title VII claim because adoptive leave was granted to both male and female adoptive parents and therefore, "leave was granted on the basis of adoptive parent status, not sex."[328]

The *Johnson* court erred in its contention that biological fathers are not discriminated against because some fathers were given leave (those who adopt). The opinion's reasoning could be analogized to arguments the Supreme Court rejected in *Martin Marietta*.[329] In that case, the plaintiff argued that the employer's refusal to hire women with children (while hiring men with children) was unlawful discrimination under Title VII.[330] In response, the defendant employer maintained that there could not be unlawful bias at play given that his employee pool was overwhelmingly made up of women (albeit without children).[331] The Supreme Court agreed with the plaintiff: The fact that one subgroup of women – those without children – was not subject to an adverse employment decision does not mean that there was not unlawful discrimination based on sex.[332] What was relevant is that the employer hired men with children, and held that the defendant misread Title VII as "permitting one hiring policy for women and another for men - each having preschool age children."[333]

An analogy could be drawn in *Johnson* that the court in that case also misreads Title VII as permitting one leave policy for biological fathers and one policy for all other parents. The fact that some fathers – those who adopt – are able to take leave does not end the inquiry: courts have held that evidence of the relative treatment of other workers in the same class is not enough to shield an employer from liability.[334] As the court in *Back v. Hastings* held, the ultimate issue is whether the *individual* was discriminated against, which can be proved without showing a comparison in how it treated other fathers.[335] And, as *Shaefer* held, class distinctions are impermissible and "void for any leave granted beyond the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions."[336] Unfortunately, many federal

[324] *Johnson,* 431 F.3d at 329-330.
[325] *Id.*
[326] *Id.*
[327] *Johnson v. Univ. of Iowa*, 408 F. Supp. 2d 728, 749 (S.D. Iowa 2004), *aff'd*, 431 F.3d 325 (8th Cir. 2005).
[328] *Id.* at 743.
[329] *Martin Marietta,* 640 U.S. at 543.
[330] *Id*.
[331] *Id*.
[332] *Id*.
[333] *Id*. at 544.
[334] *Back,* 365 F.3d at 121-22; Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, 2 EEOC Compl. Man (BNA) §615 (May 23, 2007).
[335] *Back,* 365 F.3d at 113.
[336] *Schaefer,* 903 F.2d 243 at 248.

courts mistakenly apply a comparator analysis and, as Stephanie Bornstein points out, it has tended to disadvantage men alleging sex discrimination claims based on caregiving.[337]

Additionally, the policy in *Johnson* can be distinguished from UTC's policy on a factual level. In *Johnson*, adoptive parents were given five days of leave compared to zero days for biological fathers. In the UTC policy, adoptive parents are given eight additional weeks of leave (a total of twelve weeks overall) compared to biological fathers (who are given a total of four weeks overall). In a hypothetical claim, the company would need to provide a legitimate reason for the disparate treatment. While the employer may be able to successfully argue the existence of "unique financial and legal burden" for adoptive parents, these "unique burdens" do not warrant an additional eight weeks.[338]

Recent legal challenges point to the potential vulnerability of policies that differentiate between adoptive and biological fathers. As discussed in the introduction, the Estée Lauder case settled, but the settlement itself suggests at least some apprehension on the part of Estée Lauder regarding their success on the merits. And the plaintiffs in the ongoing case of *Jones Day v. Savignac*, which survived summary judgement, made arguments regarding adoptive fathers' – but not biological fathers - ability to take primary caregiver leave as evidence of discrimination and impermissible stereotyping.[339]

It is possible that UTC's policy is a legitimate attempt to recognize the unique experiences of LGBTQ+ parents, who may be more likely to adopt and not fit into the stereotypical gender roles of heterosexual couples. In fact, UTC's policy overview uses LGBTQ+ couples as example in their overview of how the different policies operate.[340] Recognition of non-heterosexual family arrangements should be applauded, especially given LGBTQ+ parents often face particular hurdles in accessing sufficient leave time.[341] However, if this *is* the proffered reason, it both recognizes the way that LGBTQ+ relationships have allowed society to break free of gender stereotypes, while also, antithetically, reaffirming traditional gender roles among heterosexual couples. Furthermore, the inclusion of LGBTQ doesn't prove that gender was *not* considered in creating this policy. Under *Price Waterhouse's* mixed motive theory of discrimination, the existence of permissible factors driving an employer's action is not dispositive: If gender stereotypes were just one of the considerations, the employer's policy violates Title VII.[342]

B. Policies that Distinguish Between Primary & Secondary Caregivers

Some companies have disposed with any kind of gender- or sex- based language, and instead allocate paid family leave amounts based on whether an employee is a "primary" or "secondary" caregiver. In theory, such policies are not in and of themselves a Title VII violation

[337] Bornstein, *supra* note 105, at 1339-44.
[338] *Johnson*, 431 F.3d at 329-330.
[339] *See* Complaint at ¶117, *Savignac v. Jones Day*, 2020 WL 5291980 (D.D.C. 2020).
[340] *See* United Tech, *supra* note 321.
[341] Anna Halkidis, *The LGBTQ Struggle for Paid Parental Leave is Very Real*, PARENTS (Nov. 1, 2019), https://www.parents.com/parenting/dynamics/gay-parents/the-lgbtq-communitys-struggle-for-paid-parental-leave-is-very-real/.
[342] *Price Waterhouse*, 490 U.S. at 229. *See also* 42 U.S.C. §2000e-2m (allowing for a mixed motive theory to be used in a Title VII claim)

to the extent they are neutral with respect to gender or sex. [343] That would mean that companies allow anybody who self-identifies as a primary caregiver to take advantage of the more generous leave period. Even still, such policies are normatively problematic. Employees' interpretation of these policies cannot be detached from the larger social context, and will likely fall along gendered lines. As one commentator noted, male employees who "muste[r] the courage" to ask for primary caregiver leave "will have to overcome a policy that is predicated on the assumption that parental leave is women's work."[344]

An employer opens themselves to potential legal liability when their primary/secondary caregiver policy is, in practice, a way to allocate leave differently to male versus female employees. Under *Manhart*, traits that operate as a proxy for sex to justify disparate treatment are prohibited under Title VII.[345] An employer that denies a man's request for primary caregiver leave is acting on the basis of an impermissible discrimination if they are motivated, in part or in whole, by gender stereotypes pertaining to men's caregiving capacity.[346] Therefore, a court may grant relief to a male plaintiff denied primary caregiver leave if he proves that "primary caregiver" is a proxy for mothers, and that he would have been treated differently "but for" his or her sex.[347]

Generally, there are two common ways in which employers use the primary/secondary caregiver categories as a way to covertly create classifications based on sex. First, employers may use gendered language or sex-specific traits to determine who is a primary caregiver. Alternatively, the written policy may be facially neutral, but be applied unevenly. For example, an employer may interfere or retaliate against a father attempting to exercise his right to primary caregiver leave.

1. Gendered Definitions or Requirements for Primary/Secondary Caregivers

Today, policies that *explicitly* define primary caregivers as women are rare. But to the extent they do exist, they are violative of Title VII unless connected to disability.[348] Instead, employers are more likely to premise primary caregiver eligibility on characteristics that are largely applicable to women. For example, Wells Fargo provides "up to 16 weeks of paid parental leave for a primary caregiver" to "care for a new child following birth or adoption."[349] Secondary caregivers are given four weeks.[350] While these terms are not defined, the fact that birthmothers need to recover (and, for some, breastfeed) after childbirth dictates that the individual caring "for a new child following birth" tends to be the woman (at least in heterosexual couples. As discussed previously, while the inclusion of adoptive leave complicates things somewhat (as it gives an employer some cover to contend that these aren't sex-based classifications), it is likely a Title VII violation regardless.

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[343] *See Knussman*, 272 F.3d 634-36, 639.
[344] Cunningham, *supra* note 19, at 977.
[345] *Manhart*, 435 U.S. at 178. *See also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018), *aff'd Bostock v. Clayton Cnty., Ga.*, 140 S Ct. 1731 (2020).
[346] *Price Waterhouse*, 490 U.S. at 250.
[347] *Bostock*, 140 S.Ct. at 1739-40.
[348] *See supra* notes 259-268 and accompanying text.
[349] *Our Benefits*, WELLS FARGO, https://www.wellsfargo.com/about/careers/benefits/#:~:text=Parental %20and%20Critical%20Caregiving%20Leaves&text=Wells%20Fargo%20provides%20up%20to,one%20full%20year%20of%20service (accessed April 24, 2021).
[350] *Id*.

A male plaintiff could argue that the primary/secondary distinction not only discriminates against the employee, but also against that employee's family. Newport addressed a company that provided female employees with pregnancy benefits, while excluding the wives of male employees.[351] The policy at issue, the Court stated, "violates Title VII by discriminating against male employees."[352] That is because the plan "unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees."[353] While the PDA was also at play in *Newport News*, EEOC guidelines similarly state that the unequal allocation of family benefits are unlawful discrimination.[354] In the case of family leave, a plaintiff could draw on this precedent[355] to argue that families of male employees are unlawfully denied the benefit of parental leave policies that are afforded to female employees based on impermissible stereotyping: that men cannot be primary caregivers.

The same reasoning would apply in cases in which employers require men to "prove" their primary caregiver status, while granting automatic eligibility to women. In addition to the arguments discussed above, one could analogize to caselaw discussed above holding that, in the context of the tender years doctrine, it is a violation of equal protection to assume that a woman is the primary caregiver. [356] As discussed, while an employer policy may give preference for pregnancy accommodations and childbirth recovery, under Title VII, they may not make classifications based on "stereotypical notions about pregnancy and the abilities of pregnant workers," or new mothers.[357] For policies that grant significant differences in leave time between primary and secondary caregivers, it would be difficult to proffer a legitimate business reason for requiring proof of status only from men. The Supreme Court has noted that "drawing a sharp line between the sexes, solely for the purpose of achieving administrative convenience" is an impermissible justification.[358]

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[351] *Newport News*, 462 U.S. at 684-85.
[352] *Id*. at 685.
[353] *Id*. at 684.
[354] 29 CFR §1604.9(d). The guidelines state that "it shall be an unlawful employment practice to make available. . . benefits to the husbands of female employees which are not available for male employees [and vice versa]. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits."
[355] This reasoning was present in *Frontiero,* where the Supreme Court noted that the denial of military spouse benefits to Joseph Frontiero based on his inability to prove dependency also harmed his wife Susan, given that their household relied on both incomes. *Frontiero,* 411 U.S. at 688. Thus, the classification treated the *families* of service members differently based on whether they were men or women. Similar reasoning was invoked in *Wiesenfeld,* in which the Court stated that the denial of benefits to Stephen Wiesenfeld also harmed women like his deceased wife Paula, whose family "failed to receive for her family the same protection which a similarly situated male worker would have received." *Wiesenfeld,* 420 U.S. at 645. *See also Goldfarb*, 430 U.S. at 208-09 ("Both the female wage earner and her surviving spouse are disadvantaged by operation of the statute, but this is because 'Social Security is designed . . . for protection of the family' and the section discriminates against one particular category of family in which the female spouse is a wage earner covered by social security." Thus, the Court stated that the denial of benefits "impermissibly discriminates against a female wage earner because it provides her family less protection than it provides a male wage earner, even though the family needs may be identical.") (internal citations omitted).
[356] *See supra* note 254 and accompanying text.
[357] *Guerra*, 479 U.S. at 290.
[358] *Frontiero,* 411 U.S. at 690. *See also Wengler*, 446 U.S. at 152 ("We think . . . that the claimed justification of administrative convenience fails, just as it has in our prior cases."); *Reed,* 404 U.S. at 76 ("To give a mandatory preference to members of either sex . . . merely to accomplish the elimination of hearings on the merits is to make

The requirement that men need to "prove" their primary caregiver status is at the heart of the recent challenges against J.P. Morgan and Estée Lauder. In *Rotando v. J.P. Morgan*, for example, Derek Rotondo was the named plaintiff in a class action challenging J.P. Morgan's denial of primary caregiver leave (which gave 16 weeks of paid time off) to fathers.[359] Before the birth of his child, J.P. Morgan informed Rotando that he was only eligible for two weeks of secondary caregiver leave unless he could show that his wife had returned to work or that she was medically unable to provide childcare.[360] Birth mothers did not have to make a similar showing.[361] In his motion for class certification, Rotando cited cases such as *Newport News, Manhart, Schafer*, and *Hibbs* to argue that the distinction was based on impermissible sex-stereotyping. J.P. Morgan settled for $5 million, and agreed to change its policies.[362] Estée Lauder, who was challenged based on similar facts, also settled.[363]

2. Interference or Retaliation for Taking Primary Caregiver Leave

In other cases, companies may offer facially neutral primary caregiver leave, but interfere or retaliate against fathers that try and take it, a scenario which would be adjudicated under the *Price Waterhouse* theory of stereotyping.[364] This kind of interference was central to the claim in *Knussman*: Even though the Maryland State policy made no mention of gender or proof requirements, the employer interfered in the plaintiff's ability to take primary caregiver leave by telling him that only birth mothers qualified.[365]

Covered employees may also bring a claim under the FMLA, which also prohibits interference or retaliation for exercising one's right to leave. In fact, while the *Knussman* plaintiff originally brought an FMLA claim, and was awarded damages, the district court vacated the jury's verdict based on the Eleventh Amendment. The plaintiff did not appeal the district court's decision and that issue was not addressed by the Fourth Circuit.[366] Today, the plaintiff's FMLA claim would likely survive: *Knussman* was decided before *Hibbs*, in which the Court held FMLA to be a permissible use of Congress' remedial power. The Court in *Hibbs* noted that Congress had evidence that the facially non-discriminatory policies of both states and private companies were being applied in discriminatory ways.[367] Justice Rehnquist stated that Congress sought to confront the "serious problems with the discretionary nature of family leave."[368] Without a universal, "across-the-board" standard, individual managers were free to discriminate.[369] This kind of discretion was at the heart of Knussman's legal challenge in that it was not about how the policy

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the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . ."); *Goldfarb*, 430 U.S. at 219-20 (stating that the elimination of making dependent widows prove eligibility for survivor's benefits is relatively modest and therefore "I am therefore convinced that administrative convenience was not the actual reason for discrimination.") (Stevens, J. concurring).

[359] Complaint, *Rotondo v. JPMorgan Chase*, 19-cv-408 (S.D. Ohio 2019).

[360] *Id.* ¶3.

[361] *Id.*

[362] Dailey, *supra* note 31.

[363] *See* Complaint, *EEOC v. Estée Lauder Cos.*, Case 2:17-ev-03897-JP (E.D. Pa. Aug. 30, 2017).

[364] *See Back*, 365 F.3d at 115 (applying a *Price Waterhouse* analysis to caregiver discrimination).

[365] *Knussman*, 272 F.3d at 628-29.

[366] *Id.* at 629, n. 5.

[367] *Hibbs*, 538 U.S. at 732.

[368] *Id.* (quoting H.R. Rep. No. 103-8, pt. 2, pp. 10-11 (1993)).

[369] *Id.* at 732, 737.

was written, but how it was applied. [370]

Stephanie Bornstein notes how men have been more successful in challenging discrimination under the FMLA in comparison to Title VII.[371] This may be due to the fact that, under the FMLA, plaintiffs do not need to prove discriminatory intent, making these claims more straightforward, and more difficult for courts to misapply the law.[372] Regardless, claims under both statutes rely on the same theory of sex stereotyping discussed throughout this paper. To the extent that a plaintiff is covered by the FMLA, he should bring actions under both laws.

C. Extended Disability Leave

Another way employers create discriminatory leave policies is by providing women with generous leave policies labeled as "disability leave"– beyond the recovery period – while giving a fraction of leave to similarly situated male employees. [373] For example, Johnson Controls, a building equipment producer, currently provides up to 24 weeks of leave for "pregnancy disability," while allocating a max of six weeks of caregiving leave for fathers.[374] While it is important to provide women with leave to recover from the trauma of childbirth, The PDA only sanctions disparate treatment during the time of *actual disability* following the birth of a child. [375]

Dicta in *Hibbs*, for example, states that the medically recommended leave time is six weeks, and that anything more than eight weeks is automatically a policy based on an "invalid stereotype."[376] Meanwhile, EEOC guidance says an employer may offer employees *up to* ten weeks leave as part of their short-term disability insurance.[377] But under what circumstances – does that apply to all birth mothers? Those that had complications? The answer is unclear, and one that courts or regulatory agencies have firmly addressed. Furthermore, if employers do offer extensive leave under short-term disability, can they do so without the documentation that is usually required for other forms of disabilities? Many policies do not require it, which is in and of itself not a bad thing. However, it also gives an employer cover to treat women vastly differently than men.

Notably, the PDA was enacted to protect women against discrimination at a time when they were routinely fired for becoming pregnant, and when leave was not available at most companies. To the extent that states or companies did provide pregnancy leave, but not other forms of disability leave, finding the preferential treatment of pregnancy to be impermissible would penalize those trying to better accommodate women when few employers did. While there was debate over merits of the PDA's grant of preferential status, it seems even the "difference

[370] *Knussman*, 272 F.3d at 628-29.
[371] Bornstein, *supra* note 105, at 1325.
[372] *Id.* at 1323-25 (providing examples of successful male caregiver discrimination claims brought under a stereotyping theory of sex discrimination).
[373] EEOC guidance states that employers should "carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth […] and leave for purposes of bonding with a child and/or providing care for a child." EEOC, Guidance on Pregnancy Discrimination and Related Issues, No. 915.003 (June 25, 2015).
[374] *2018 Employer Scorecard*, PL+US, https://paidleave.us/topemployerpolicies/#block-yui_3_17_2_1_1543154973371_90745 (accessed April 26, 2021).
[375] *Guerra*, 479 U.S. at 290 (emphasis in original).
[376] *Hibbs*, 538 U.S. at 722-23.
[377] *See Savignac*, 2020 WL at *14.

feminists," who were more accepting of special treatment, would not sanction the citation of those differences to foreclose the expansion of equality at home (i.e. giving equal leave to men).[378] As the Court noted in 2015, the PDA was not intended to grant pregnant workers a "most-favored nations status."[379] And, as discussed in the prior section, one could also cite *Johnson Controls* for the proposition that preferential treatment under the PDA is allowed only when it *improves* women's career outcomes. The research shows that disparate leave policies for men and women primarily harms women's career advancement. [380]

Furthermore, after giving birth, women are both recovering *and* giving caregiving, which is why courts have acknowledged the incongruency of strict delineations between two separate periods of leave. The court in *Schaefer*, for example, observed that "[c]hildrearing leave does not necessarily come at the end of [the disability] period after childbirth; in a real sense, it could start immediately after birth."[381] *Johnson* also conceded that the pregnancy disability leave allocated to women inevitably has some "caregiving intermingled."[382] These two cases, however, had different outcomes. In *Schaefer*, the extensive length of the leave – one year – was enough to show that the purpose of the leave was *not* disability given "[t]here is no requirement . . . that the female be disabled in order to obtain the unpaid leave for up to one year for either childbearing or child rearing."[383] Alternatively, the limited time of the leave at issue in *Johnson* – six weeks – was within the window of plausible recovery time. Perhaps one reading of these two cases, then, is that very long leaves – beyond six, or eight weeks – are evidence that the purpose of the *entire* leave itself is not to allow women to recover from childbirth, but to allow her to bond with her new child. Thus, the same right should be afforded to men.

Can a claim be made that the *entire* allocation of disability leave is pretext for a sex-based classification when the leave is longer than the time realistically needed for recovery? This is what the plaintiffs are alleging in *Savignac v. Jones Day*.[384] Mark Savignac and Julia Sheketoff, a married couple who were both lawyers at Jones Day, contend that the eight week difference between primary (given to birth mothers and adoptive parents) and secondary caregiver (given to biological fathers) leave is pretext for a gender-based classification given that it is "labeled as disability leave, but the leave is not dependent on whether women are actually disabled."[385]

The DC District Court found the plaintiffs' argument credible enough to survive summary judgement, and refused to accept at face value the notion that employers may justify unequal leaves by just labeling part of that leave as disability leave. The court found that "[w]ithout providing the parties with some opportunity for discovery and to offer evidentiary submissions, the Court cannot determine whether policy was adopted and operates, in whole or in part, as a substitute for one extended period of parental leave for birth mothers."[386]

In many ways, by finding that the plaintiffs could have a valid argument depending on the

[378] *See supra* notes 192-197 and accompanying text.
[379] *Young*, 135 S.Ct. at 1350.
[380] *See supra* notes 19-25 and accompanying text.
[381] *Schafer*, 903 F.2d at 250.
[382] *Johnson*, 431 F.3d at 332, n. 5.
[383] *Schaefer*, 903 F.2d at 248.
[384] Complaint, *supra* note 349, at ¶140.
[385] *Id.*
[386] *Savignac*, 2020 WL at *16.

evidence they put forth, the court reads the PDA in line with Title VII: that workplaces must accommodate women's unique needs, but not use it as an excuse to discriminate or differentiate between them. This aligns with Stevens' concurrence in *Guerra*, who noted that the PDA only allows special treatment when it is "consistent with 'accomplish[ing] the goal that Congress designed Title VII to achieve."[387] That goal is equality, and for companies that provide substantial paid leave to some – but not all – employees, they act in direct opposition to Title VII's purposes. As the Court in *United States v. Virginia* held, women's physical differences should not be used to perpetuate "artificial constraints" on men and women's opportunities.[388]

CONCLUSION

150 years after *Bradwell v. Illinois*, and 50 years after Ginsburg argued her first case before the Supreme Court, stereotypes regarding men and women's roles have been reduced, but have not been eliminated. Evidence from social science is clear: Until men are recognized as equal caregivers at home, women will not be recognized as equal at work.[389] While many have touted how women should "lean it" at work, perhaps the bigger issue is helping men "lean in" at home.

Of course, challenging individual companies for their paid leave programs is just a small facet of a much bigger challenge given the fact that most employers don't provide these benefits. One legal challenge won't change our broader cultural assumptions about what makes a "good" employee, nor will it unravel the outdated norms woven into the structure of work. While the FMLA attempted to undermine certain workplace conventions, its effectiveness was limited by the fact that it is unpaid and does not cover 40 percent of the workforce.

The only way to accomplish true equality is through a federal policy that gives *paid* leave to *all* workers, whether they are employees or independent contractors, as well as other supports for families that allow families to balance work and care throughout their child's life. No single policy is a panacea, especially given that enforcement of these norms often involves expensive legal challenges. Yet policy may help workers make choices for their families that are actually that: a choice, rather than an inevitability.

[387] *Guerra*, 479 U.S. at 294.
[388] *Virginia*, 518 U.S. at 533-34 ("Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.").
[389] *See supra* notes 19-25 and accompanying text.

Applicant Details

First Name	**Nicholas**
Middle Initial	**A.**
Last Name	**Bergara**
Citizenship Status	**U. S. Citizen**
Email Address	**nab584@nyu.edu**
Address	**Address** Street **122 Rutgers St** City **Maplewood** State/Territory **New Jersey** Zip **07040** Country **United States**
Contact Phone Number	**(862) 371-2051**

Applicant Education

BA/BS From	**University of Scranton**
Date of BA/BS	**June 2014**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 19, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**New York**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Baltay, Matthew
mbaltay@foleyhoag.com
(617) 832-1262
Yoshino, Kenji
kenji.yoshino@nyu.edu
212-998-6421

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nicholas Bergara
122 Rutgers Street
Maplewood, NJ 07040

June 19, 2023

The Honorable Kiyo A. Matsumoto
U.S. District Court - Eastern District of New York
225 Cadman Plaza E
Brooklyn, NY 11201
(718) 613-2180

Dear Judge Matsumoto,

I am writing to apply for a one-year clerkship with your chambers, starting in October 2025, after I complete my fourth year of practice as an Associate at Foley Hoag LLP in New York, NY. I have greatly enjoyed attending law school and working in New York these past four years and would welcome the opportunity to serve it as a judicial clerk.

Enclosed please find my resume, law school transcripts, and writing sample. The writing sample is my Student Note published in the NYU Law Review. My letters of recommendation will be sent separately.

My recommenders are Professor Kenji Yoshino and Matthew Baltay. Professor Yoshino was my Leadership, Diversity, and Inclusion professor, when I was a second-year student at NYU School of Law, while Mr. Baltay is a Senior Litigation Partner at Foley Hoag LLP, who I have been assisting with a significant class action matter. Below is the contact information for my recommenders:

Kenji Yoshino: kenji.yoshino@nyu.edu; (212) 998-6421
Matthew Baltay: mbaltay@foleyhoag.com; (617) 832-1262

Please let me know if you have any questions or need any other information.

Sincerely,

NICHOLAS BERGARA
122 Rutgers St., Maplewood, NJ 07040 • (862) 371-2051 • nab584@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., May 2021
Honors: *New York University Law Review*, Online Editor
Publications: *Nipping It in the Bud: Fixing the Principal-Agent Problem in Class Actions By Looking to Qui Tam Litigation*, 97 N.Y.U. L. REV. 275 (2022)
Activities: Transfer Student Committee, Academic Co-Chair; Student Bar Association, Accessibility Chair (2020-2021) and Transfer Student Representative (2020); Disability Allied Law Students Association, Secretary; Latinx Law Students Association, Bylaws Committee Chair; Solitary Confinement Project, Advocate

EMORY UNIVERSITY SCHOOL OF LAW, Atlanta, GA
Matriculated August 2018–May 2019
Honors: Merit Scholarship; Deans List Fall 2018 and Spring 2019
Activities: Latin American Law Students Association, Vice President

THE UNIVERSITY OF SCRANTON, Scranton, PA
B.S. in Criminal Justice with minors in Political Science and Spanish, June 2014

EXPERIENCE

FOLEY HOAG LLP, New York, NY
Litigation Associate, September 2021–Present; ***Summer Associate***, June 2020–July 2020
Researched and drafted legal memoranda on a variety of legal issues including discovery, evidence, procedural rules (civil and criminal), class actions, and federal statutes (e.g., Bank Secrecy Act and the Foreign Sovereign Immunities Act). Drafted motions to dismiss, oppositions to motions to dismiss, motions to transfer, and pre-motion letters. Managed numerous aspects of document production, including supervising legal personnel. Prepared requests for admission, interrogatories, and document production requests. Drafted sections of legal briefs, opening statements, and cross examination outlines, in connection with representation of a sovereign state. Prepared witnesses for arbitration hearings (domestic and international), ultimately resulting in positive outcomes for clients. Consulted with experts about discovery requests and expert reports, and revised expert reports. Advised clients on issues related to export controls and trade sanctions under federal law. Founded first affinity group for people who identify as disabled and allies, ACCESS and organizes events for ACCESS members. Maintain an active pro bono practice which includes helping incarcerated individuals with sentence mitigation, assisting juveniles with immigration proceedings, and counseling nonprofits with respect to both reproductive healthcare (domestic and international) and advocating for changes in federal legislation.

THE HONORABLE JAMES D'AUGUSTE, NEW YORK CITY SUPREME COURT, New York, NY
Judicial Intern, Sotomayor Judicial Internship Program, June 2019–August 2019
Performed legal research and wrote orders to dismiss for failure to state a claim. Observed civil trials, including for nuisance, contracts, and personal injury. Discussed observations with the Judge and made recommendations.

VOLUNTEER EXPERIENCE

LA AMISTAD, Atlanta, GA
Volunteer, February 2019–May 2019
Tutored Latinx students who were struggling with their elementary school coursework. Collaborated with a team of volunteers to improve the grade point averages of all students.

NEW JERSEY COURTS, Essex County, NJ
Volunteer Mediator, September 2016–August 2018
Promoted to lead mediator for Municipal Court of Irvington and Municipal Court of Newark after six months of service. Performed conflict resolution by acting as intermediary between plaintiffs and defendants. Successfully mediated over one hundred and fifty cases in the following areas: family law, landlord-tenant, and small claims.

ADDITIONAL INFORMATION

Fluent in Spanish. Interests include learning to cook new dishes, competitive gaming, and practicing tennis.

Name: **Nicholas A Bergara**
Print Date: **05/22/2023**
Student ID: **N17546734**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/19/2021
School of Law
Honors: cum laude
Major: Law

Transfer Credits

Transfer Credit from Emory University
Applied to Fall 2019

Course	Description	Units
LAW 505	Civil Procedure	4.0
LAW 510	Legislation/Regulation	2.0
LAW 520	Contracts	4.0
LAW 525	Criminal Law	3.0
LAW 530	Constitutional Law I	4.0
LAW 535A	Intro Legl Anlys Rsrch & Comm	2.0
LAW 545	Property	4.0
LAW 550	Torts	4.0
LAW 628Y	Intro to Law & Econ	3.0
	Transfer Totals:	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	4.0	A
Instructor: William T Allen, Edward Baron Rock			
Family Law	LAW-LW 10729	4.0	B+
Instructor: Melissa E Murray			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B
Instructor: Oscar G Chase			
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	A-
Instructor: Kenji Yoshino, Jessica A Moldovan			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	12.0	42.0

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Mediation Clinic - Advanced: Dispute System Design	LAW-LW 11031	3.0	CR
Instructor: Raymond E Kramer, Daniel Michael Weitz			
Mediation Clinic - Advanced: Dispute System Design Seminar	LAW-LW 11641	2.0	CR
Instructor: Raymond E Kramer, Daniel Michael Weitz			
Family Practice Simulation	LAW-LW 12071	3.0	CR
Instructor: Peggy C Davis, Brence D Pernell			
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	CR
Instructor: Kenji Yoshino, Jessica A Moldovan			
Lawyering for Transfers	LAW-LW 12627	3.0	CR
Instructor: Rachel Wechsler			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	25.0	55.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Law Review	LAW-LW 11187	2.0	CR
Federal Courts and the Federal System	LAW-LW 11722	4.0	B+
Instructor: Trevor W Morrison			
Judicial Decision Making	LAW-LW 12250	4.0	A-
Instructor: Barry E Friedman			
Contract Drafting	LAW-LW 12503	3.0	A
Instructor: Naveen Thomas			
Class Actions Seminar	LAW-LW 12721	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	40.0	70.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Race, Values and The American Legal Process	LAW-LW 10545	2.0	A
Instructor: Vincent Southerland			
Alternative Dispute Resolution	LAW-LW 11368	3.0	A
Instructor: Rebecca Price			
Evidence	LAW-LW 11607	4.0	CR
Instructor: Erin Murphy			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	53.0	83.0

Staff Editor - Law Review 2019-2020
Online Editor - Law Review 2020-2021

End of School of Law Record

Advising Document - Do Not Disseminate

Name: **Nicholas Bergara**
Student ID: **2366081**

Institution Info: Emory University
Student Address: 122 Rutgers St
Maplewood, NJ 07040-3250
Print Date: 05/27/2019

Beginning of Academic Record

Fall 2018

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	505	Civil Procedure	4.000	4.000	B+	13.200
LAW	510	Legislation/Regulation	2.000	2.000	A	8.000
LAW	520	Contracts	4.000	4.000	B+	13.200
LAW	535A	Intro.Lgl Anlys, Rsrch & Comm	2.000	2.000	A+	8.600
LAW	550	Torts	4.000	4.000	A-	14.800
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000

			Attempted	Earned	GPA Units	Points
Term GPA	3.613	Term Totals	16.000	16.000	16.000	57.800
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.613	Comb Totals	16.000	16.000	16.000	57.800
Cum GPA	3.613	Cum Totals	16.000	16.000	16.000	57.800
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.613	Comb Totals	16.000	16.000	16.000	57.800

Spring 2019

Program: Doctor of Law
Plan: Law Major

Course		Description	Attempted	Earned	Grade	Points
LAW	525	Criminal Law	3.000	3.000	A+	12.900
LAW	530	Constitutional Law I	4.000	4.000	A	16.000
LAW	535B	Introduction to Legal Advocacy	2.000	2.000	A-	7.400
LAW	545	Property	4.000	4.000	A	16.000
LAW	599A	Professionalism Program	0.000	0.000	S	0.000
LAW	599B	Career Strategy & Design	0.000	0.000	S	0.000
LAW	628Y	Intro to Law & Econ	3.000	3.000	B+	9.900

			Attempted	Earned	GPA Units	Points
Term GPA	3.888	Term Totals	16.000	16.000	16.000	62.200
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.888	Comb Totals	16.000	16.000	16.000	62.200
Cum GPA	3.750	Cum Totals	32.000	32.000	32.000	120.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.750	Comb Totals	32.000	32.000	32.000	120.000

Fall 2019

Program: Doctor of Law
Plan: Law Major

Advising Document - Do Not Disseminate

Name: **Nicholas Bergara**
Student ID: **2366081**

Course		Description	Attempted	Earned	Grade	Points
LAW	648	Adv'd Legal Writing & Editing	2.000	0.000		0.000
LAW	649	Writing for Judicial Chambers	2.000	0.000		0.000
LAW	651	Labor Law	2.000	0.000		0.000
LAW	657	Advanced Legal Research	1.000	0.000		0.000
Course Topic:		Mastery of Secondary Sources				
Course Topic:		Mastery of Secondary Sources				
LAW	657	Advanced Legal Research	1.000	0.000		0.000
Course Topic:		Mastery of Statutory Legal Rsc				
Course Topic:		Mastery of Statutory Legal Rsc				
LAW	662	Education Law and Policy	2.000	0.000		0.000
LAW	683	White Collar Crime	3.000	0.000		0.000
LAW	870E	EXTERN: Judicial	1.000	0.000		0.000
LAW	871	Extern: Fieldwork	2.000	0.000		0.000
Course Topic:		Fieldwork: 150 Hours (2 units)				

			Attempted	Earned	GPA Units	Points
Term GPA	0.000	Term Totals	16.000	0.000	0.000	0.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	0.000	Comb Totals	16.000	0.000	0.000	0.000
Cum GPA	3.750	Cum Totals	48.000	32.000	32.000	120.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.750	Comb Totals	48.000	32.000	32.000	120.000
Law Career Totals						
Cum GPA:	3.750	Cum Totals	48.000	32.000	32.000	120.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.750	Comb Totals	48.000	32.000	32.000	120.000

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New York University
A private university in the public service

School of Law

40 Washington Square South, Room 501
New York, NY 10012-1099
Telephone: (212) 998-6421
Facsimile: (212) 995-3662
E-mail: kenji.yoshino@nyu.edu

Kenji Yoshino
Chief Justice Earl Warren Professor of Constitutional Law
Faculty Director of the Meltzer Center for Diversity, Inclusion, and Belonging

June 20, 2023

RE: Nicholas Bergara, NYU Law '21

Your Honor:

I write to recommend Nicholas Bergara, a member of NYU School of Law's Class of 2021, for a clerkship in your chambers. I taught Nick in a year-long seminar titled "Leadership, Diversity, and Inclusion" (LDI) in 2019-2020. I therefore feel I know Nick well and feel confident giving him an enthusiastic recommendation.

Nick is a student who is on a relentless upward trajectory. He graduated from the University of Scranton in 2014, enrolled in Emory Law School in 2018, then transferred to NYU as a 2L student. He earned a place on the *Law Review*, published a student Note, and made mostly A grades here. He is now an associate at Foley Hoag and is ready for the next challenge. I know he will seize it.

My confidence is rooted in Nick's performance in my LDI class. The class has an enrollment limited to eighteen students each year. It seeks to "boot camp" the class not only on the substance of diversity and inclusion, but also on practical skills such as writing and oral presentations. My co-instructor and I work extremely closely with each of the students.

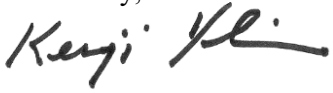
Nick distinguished himself in each aspect of this intense class. He received the following grades for the various components of the class: his written work hovered between a "B-plus" and an "A-minus," his oral presentations toggled between an "A-minus" and an "A", and his in-class work rated a flat "A." He received an "A-minus" overall in a highly competitive year.

In terms of his intellectual interests, Nick was particularly focused in our class on socioeconomic inequality. He wrote his paper and gave a presentation on Lauren Rivera's book *Pedigree: How Elite Students Get Elite Jobs*. His paper trenchantly argued that Rivera was insufficiently focused on systemic solutions in her work. His presentation applied her insights to law firm recruitment.

I have not kept in close touch with Nick since the class ended in 2020 and he graduated in 2021. However, he did write to me when his firm implemented mandatory unconscious bias training. We had discussed a paper in class by Frank Dobbin and Alexandra Lahav that suggested that mandatory diversity training can be counterproductive. Nick wanted to make sure he correctly remembered this argument and its limitations before bringing it to the attention of firm leadership. To me, his outreach was a wonderful character note. Nick is a rigorous and practical person who doesn’t just let ideas float in the air. Where he thinks one might have a real-life application, he won’t hesitate to jump in to address it.

I recommend him without reservation.

Sincerely,



Kenji Yoshino

NIPPING IT IN THE BUD: FIXING THE PRINCIPAL-AGENT PROBLEM IN CLASS ACTIONS BY LOOKING TO QUI TAM LITIGATION

Nicholas Alejandro Bergara*

The principal-agent problem in class actions, which occurs whenever the interests of class counsel (the agent) conflict with those of the class (the principal), has plagued the class action system for decades. When these conflicts of interest arise, they often lead to plaintiff classes receiving lower monetary awards than they otherwise deserve, above-market fees for attorneys, and underenforcement of claims against wrongdoers. Throughout the years, both Congress and scholars alike have tried to address this issue, but it persists. This Note invites Congress and scholars to think differently about potential solutions to a problem that has been around for far too long. It argues that looking to qui tam litigation, specifically, the False Claims Act, provides a unique approach that could help significantly curtail the principal-agent problem. By permitting the government to install itself as lead counsel in class actions involving money damages—when it deems an action to be worthy—the financial incentives between any given class and its respective class counsel are realigned. While private attorneys seek the maximum amount of attorney's fees, even if it comes at the expense of the client, government lawyers do not have the same motivation. Adding an amendment to Federal Rule of Civil Procedure 23 permitting qui tam litigation would allow the government to act as a gatekeeper for class actions while leaving the option open for private attorneys to bring suit should the government decide not to do so. By providing different channels of enforcement, the amendment offers a promising opportunity to better deter private sector misconduct, discourage frivolous suits, and improve the overall outcomes for plaintiff classes.

 J.D., 2021, New York University School of Law; B.S., 2014, The University of Scranton. I am very grateful to Judge Jed S. Rakoff for his helpful guidance and feedback during the early stages of this Note. Judge Rakoff's Class Action Seminar not only inspired this Note, but it also gave me the foundational knowledge needed to complete it. I would also like to thank the editors of the *New York University Law Review*, and in particular David Blitzer, for their diligence in reviewing and editing this Note; my friends and colleagues, specifically Jessica Li, Safeena Mecklai, Adrian Melendez-Cooper, Michael Milov-Cordoba, and Taylor Zarth, who provided critical advice when I was skeptical about continuing this project; and a special thank you to my mother, Veronica Bergara, who has stood by my side throughout this entire endeavor.